A

SERIES OF LETTERS

TO THE

Right Hon. *Edmund Burke*;

IN WHICH ARE CONTAINED

ENQUIRIES

INTO THE

CONSTITUTIONAL EXISTENCE

OF

AN IMPEACHMENT

AGAINST

Mr. HASTINGS.

By G. HARDINGE, Esq. M.P.

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LETTER THE FIRST.

Vereor committere, ut non bene proviſa et diligenter explorata PRINCIPIA ponantur.

CIC. *de Leg.*

SIR,

THOUGH I have not the honor of your perſonal acquaintance, and am not of conſequence enough to intereſt your attention, I take the liberty of addreſſing you in print, upon a conſtitutional ſubject, which has of late occupied, in ſerious argument, thoſe who have the *will* and the *power* to reaſon upon it without prejudice.

To this mode of laying my thoughts before ſo enlightened an age, I am not prompted by the arrogant and wild conception, that I could be *read*, any more than I could be *heard*, as *your* antagoniſt; but I have recourſe to it, becauſe the habits of guard over expreſſion that may offend, (a guard almoſt inſeparable from ſuch a form of addreſs,) will reſtrain any ſudden impulſe of the writer to that *polemical zeal*, againſt which men of ſober minds are prejudiced in ſuch a degree, as to refuſe even truth, if it ſhould paſs through ſo diſturbed a channel: But ſuffer me

to add, that, being a zealous admirer of your eminent fame and worth, I ſhall, with more diffidence upon that account, offer *my* opinions to the public, where I feel them to be diſcredited, as being the reverſe of thoſe which *you* have entertained.

I, Sir, am one of the few, who thought it would not have degraded, or weakened, any inquiſitorial rights which the elected repreſentatives of the people are authoriſed by the conſtitution to enforce, if the *committee* had *enquired* into the law, as it ſtood upon record in the journals * of parliament, before they affirmed, " *That an impeachment, after evidence has been* " *heard upon it in one parliament, may be con-* " *tinued in the next, from the point at which it* " *ſtood when the former parliament was cloſed* " *by a diſſolution*;" which, as you explained it, is the view and ſpirit of their vote upon the 23d of December 1790.

But as the debate on this critical ſubject was continued for three days, and produced a very able diſcuſſion of all the various grounds upon which that vote could be ſupported, I ſhall con-

* The houſe of lords have inſtituted a committee for the examination of precedents, though informed by the commons, not of their *judicial vote*, but of their *perfect readineſs* to carry on the impeachment; which readineſs indicates *their* ſenſe of the law to be, that an impeachment is depending.

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ſider it, as if the examination of precedents had been directed, and had brought forward, in a parliamentary form, the materials to which the argument has referred.

It is not in a technical, or contracted view of the ſubject, that I lament this reſolution, but as tending to conſequences that ſtrike at the root of juſtice, and freedom.

If it could end with Mr. Haſtings, I ſhould ſay, " *Felices errore ſuo!*" For I am ſtill of opinion, that *political* honor, which is always *political* wiſdom, demands the further trial of that culprit.

Nor would I perhaps lament this reſolution as a mere precedent of the particular doctrine (though *queſtionable* at leaſt, upon topics of convenience and of juſtice), if I had not ſeen it accompanied, and ſupported by topics of reaſoning, which appear to me rather calculated, in their nature (though not in the view of thoſe who made uſe of them) to be the engines of deſpotiſm, than of liberty, well underſtood.

I allude, Sir, to thoſe *general principles* which have been either directly aſſerted, or inſinuated, and fatally aſſumed.

If *they* are eſtabliſhed, there is an end of that balance between the rights of the Sovereign and

thoſe of the people, which is the vital ſpirit of this Conſtitution; for, by *theſe* principles, all the rights of the Executive Power, as well as thoſe of the other Eſtates, may acquire an indefeaſible character; *State Neceſſity*, the tyrant's plea, may again be made the artful pretence for every oppreſſion by either of theſe rival powers, but with an advantage-ground of *Parliamentary law*.

I have reflected ſeriouſly upon theſe principles, and though ſome of them are popular in their ſound, they carry no weight, in my eſtimation, but of danger to the government in which I was born, and whoſe conſtitutional powers I have revered, becauſe I believed them to be thoſe of a check, formed by jealous claims, not only between thoſe who govern and thoſe who are governed, but, in the ſame degree, between the ſeveral orders of that government, with a reference to each other, as their antagoniſt, and competitor.

I. " *That what is neceſſary to the uncontrouled* " *and univerſal effect of a Conſtitutional Right,* " *is therefore a part of it.*"

Here no line is drawn, or attempted; and, if there is none, it leads to endleſs confuſion.

For example, who ſhall tell me, that if the Right of Impeachment is abſolute, and carries with

with it all that is neceſſary to its unlimited perfection, the accuſer is, or can be, excluded from the Court who are to ſit upon his culprit, while they are debating, and even determining, the various points of law that ariſe? Who ſhall tell me, that he can have no power to effectuate the continued and perſevering attendance of that Court? That he has no right of impriſonment*, or of bail; or of enſuring their continuance, when directed by the Lords? That he may *demand Judgment*, but has no legal power to *demand* the *execution* of it?

But let us purſue this captivating ſentiment into other conſtitutional rights.

It is the right of the Commons to enjoy unlimited freedom in debate; but is it a part of that right, that no man ſhall be turned out of an office held at the King's pleaſure, for his vote in Parliament; or, that no placeman can have a ſeat?

I give no opinion of my own upon the famous queſtion,—Whether incapacity of return to Parliament aroſe from expulſion, and gave to the candidate a ſeat in the Houſe, whom *three*, out

* The Lords would not commit *Lord Clarendon* in 1667, nor this *Earl of Danby*, at the firſt requiſition of the Commons, becauſe the offence *was not* high treaſon, though called by that name.

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of *three thouſand*, electors might have nominated?—But this, at leaſt, will be remembered—that it was a point of difficulty; that ſome of the beſt *Whigs* in England (and yourſelf in particular) inſiſted upon the right of obtruding the candidate on thoſe who had refuſed, and ejected him; that a *Reſolution*, affirming the minority of the votes to give the ſeat, is expunged from the Journals, which (as I agree with a very eloquent and able Stateſman) does not *affirm* the law to be otherwiſe, but certainly intimates an *opinion* that it is, and an opinion of as enlightened a Houſe of Commons as ever ſat: Yet if the Houſe could expel, was it not eſſential to the uncontrouled and abſolute right of expulſion, that it ſhould bar the door againſt that ſame individual, in his new ſhape of a candidate returned immediately after this mark had been ſet upon him? Was it not eſſential to the right, as attracting to it all its neceſſary advantages, that no peeviſh, and captious warfare ſhould proceed between the Electors and the Houſe of Commons, by the repeated re-election and refuſal of the obnoxious candidate; but that any competitor who had a ſingle vote, ſhould be received, upon the eſtabliſhed principle, that a candidate ineligible is as no candidate? And what a monſter of abſurdity it is, that a Member of Parliament, expelled for the worſt offences that can diſgrace a man, may be

be eligible,—may ſit by force, upon the return of that writ which declares the vacancy ariſing from his expulſion! But how were thoſe topics of reaſoning met, and anſwered by the eloquent, and conſtitutional arguments * which you, and your friends, adopted with ſucceſs? I will not impair them by attempting to do them juſtice; but I will only inſiſt, that, if *they* were found, they refute that principle which I am now endeavouring to convict of error, and of danger to the government.

In all theſe, and a thouſand other exigencies, of a ſimilar nature, the conſtitution of this mixed government looks on both ſides, and would rather want a part of its object, or of the means by which it can be obtained, than give to another party in the conteſt a right which is not eſtabliſhed by uſage, or principles of law. Is it not *eſſential* to the *uncontrouled effect* of the king's prerogative in declaring war, but is it *a part* of this prerogative, that he ſhould find in his public revenue, or obtain by levies

* The queſtion is admirably put, in a mere ſtatement of the *fact*, by the writer of *Thoughts upon the cauſes of the preſent diſcontents*. "The electors of Middleſex choſe a perſon whom "the houſe of commons had voted incapable, and the houſe "of commons had taken in a member whom the electors of "Middleſex had *not* choſen." They declared, "that the "true legal ſenſe of the county was contained in the mino-"rity, and might, on a reſiſtance to a vote of incapacity, be "contained in *any* minority."

upon the people, an adequate eſtabliſhment of naval, and military force? Can he touch one ſhilling of the nation's purſe, if the commons tell him he ſhall have no ſupplies? Many other admitted prerogatives are made nugatory by the oppoſition of conſtitutional difficulties, indiſpenſible to that vigilant ſuſpicion which is entertained againſt the abuſe of right *.

II. " *That no right of the ſovereign can by its* " *abuſe impair the effect of a right which the* " *commons enjoy.*"

This principle cannot be illuſtrated with more advantage than in the caſe before us, to which it has been applied with ſuch captivating talents, and powerful impreſſion, by the moſt eloquent of men. The *ſubſtance* of the argument is upon a level to homelier capacities; and may be deſcribed even by me.

It has been ſaid—" That impeachment is a " public accuſation by all the commons of " England againſt a delinquent of ſtate; whom " the law, in its regular courſe of juſtice, can- " not reach with effect; that moſt of all, it is " pointed againſt men of high authority, rank,

* *Mr. Paine*, in *his* " Rehearſal" (of a new conſtitution for Great Britain) has " *elevated, and ſurprized*" us with a diſcovery, " that in mixed governments no reſponſibility " can exiſt."—The charm that binds this *agreeable* paradox, is a very ſimple one; he aſſumes *univerſal corruption* as the ſecret mover of the whole machine. — *Rights of Man*, p. 153.

" and power; that in this view it is, and means
" to be, a check upon the abuſe of Royal favor
" and confidence by wicked Miniſters; that it
" gives energy to that wholeſome fiction of the
" Law which exempts the King from blame,
" for the purpoſe of diſabling him to ſhift the
" entire odium upon himſelf, and weaken the
" terror of it againſt his adviſers. If they are,
" in truth, ſlaves to him, the Conſtitution
" forces them to be reſponſible for that ſervility,
" by calling it *advice*, in order to puniſh the
" guilt, and avert the miſchief. But if the
" King diſſolve the Parliament by his prero-
" gative, to ſave a juſtly execrated Miniſter
" from Impeachment, it is no longer a terror
" to the King, or his co-adjutors in the govern-
" ment; and as there is no other appeal, but an
" appeal to the ſword, they have perfect impu-
" nity, or the nation is thrown into a civil war:
" —So thought, felt, and acted our anceſtors in
" the *Earl of Danby*'s memorable caſe, when
" they rejected the King's pardon as an objection,
" *in limine*, to their Impeachment. The caſe in
" the terms of it was new; the right of pardon,
" taken in the abſtract, was unlimited; but *this*
" limitation of it, their public ſpirit challenged
" and ſecured. Upon the ſame principles,
" though in a different ſhape of them, but no
" leſs important, the public ſpirit of theſe times

" is called upon to aſſert, that no *diſſolution* " of Parliament ſhall ſave a culprit under an " Impeachment from the continuance of his " trial; becauſe vain, and impotent would be " the benefit of diſabling his plea, ' that he was " pardoned,' if the King ſhould intercept the " courſe of juſtice, by terminating that of trial, " either at the moment before its regular end " by Judgment, or at any other period of the " evidence, when he ſhould think his favorite " moſt endangered."

This argument, (and I have done it all the juſtice I *could,)* if it be a little cloſely examined, will prove the danger of leaving thoſe boundaries which the Conſtitution has formed againſt *every* encroachment.

If the reaſoning is correct, and ſound, it cannot ſtop at the continuance of an Impeachment after a *diſſolution* of the Legiſlature, but muſt reach and cut off the King's right of pardoning the ſentence; a right which is, it ſeems, at this hour, " denied him by all the *Whigs*, and given " to him by all the *Tories*;" according to a whimſical note in *De Lolme*'s very ingenious Eſſay upon our Conſtitution *: Yet I don't recollect that it was controverted by you, or any

* It is controverted by *Williams*, as counſel for *Fitzharris*, but upon ſtrained analogies between *Impeachment* and *Appeal*.

of your able ſupporters, upon the ſubject of this Impeachment; but I *do* recollect that it was acted upon, in the caſe of the Impeached Rebel Peers, by King *George the Firſt*; and that it is repreſented by Mr. *Juſtice Blackſtone*, a new favorite of the *Whigs*, to be a point clear of doubt.

The *Right of making Peers* for the very purpoſe of ſecuring the culprit who is impeached, may, upon principles equally cogent, be denied; and a caſe may be imagined, which heightens the general miſchief reſulting from that new Peerage; let us imagine the King, with ſuch a purpoſe, to make thoſe very Commoners, who had ſet their face againſt the Impeachment, Peers of Great Britain, the day before trial; a miſchief that is not quite viſionary, for it has been felt; and the Commons actually voted in 1640, That Peers, taken from the Houſe of Commons, could not vote upon the Impeachment, becauſe they were ſtill accuſers, and bound as parties: But will any ſober man juſtify that vote, or give it the term of *privilege*—a term ſo familiar of late, and ſo miſunderſtood?

It was obſerved by an acute, and powerful diſputant, "That it was not fair to argue in "ſupport of a dangerous power, as being legal, "from the admitted legality of other powers, "which, if abuſed, might alſo be dangerous."

But ſurely it *is* fair and ſound reaſoning, againſt an argument, which, from the danger of a power in its effect upon rights confeſſed, infers, that it has no legal exiſtence,—to ſhew, that other powers, reſiding in the ſame part of the government, admitted on all hands to exiſt, may yet, by their abuſe, injure the very ſame rights.

In anſwer to a ſuppoſed hiſtory of the fact, that the King's right of pardon was refuſed by the Commons, where it was attempted in oppoſition to the very outſet of the Impeachment, I would firſt aſk, if it is neceſſary, that becauſe our anceſtors made a new, and a very wholeſome law, but in a moſt irregular ſhape, through the channel of powers uſurped in a party-conflict, and which at laſt required the guarantee of the Legiſlature, *we* are therefore to aſſert, as a rule binding *us*, and binding the Houſe of Peers, another propoſition, which has no principle, or colour for it in the Law of Parliament?

But the *fact* reſpecting this pardon has been miſconceived; and, as every point of it may illuſtrate the immediate ſubject before us, I ſhall take the liberty of requeſting a particular attention to it * *here*, though it ſhould rather form

* Before it was pleaded, the *Chancellor* (afterwards *Lord Nottingham*) had thrown it upon the King, as a perſonal act of

form a part of another and future diſcuſſion.

The pardon was pleaded in the court which can alone receive, and alone determine, every ſuch plea,—that is, in the houſe of lords. Either it was the right, and the duty of the lords to give judgment upon that plea, or there is no point of law judicially before them, upon which they are to determine for themſelves. Yet mark, I entreat you, the conduct of thoſe whom you have repreſented as models worthy of our imitation: Having underſtood, that, upon receiving this plea, the lords had *committed the offence* of appointing a day upon which it was to be argued, they affirm *judicially*, by a vote of their own, the pardon to be illegal, and "*therefore* "demand judgment *accordingly:*" In other words, they dictate what the judgment ſhall be: But they do more; for they vote (9th *May* 1679), that whoever ſhall preſume to maintain the validity of this pardon before the lords, without *their* leave, ſhall be accounted a betrayer of the liberties of the houſe of commons:— "*Itaque perpaucis adverſantibus omnia quæ ne* "*per populum, ſine ſeditione, ſe aſſequi poſſe arbi-*

of his own; with a time-ſerving ſpirit, and a double treachery, which, in other times, would have juſtly irritated the commons againſt *him*; but his *evidence* was *convenient*.

" *trabantur, per ſenatum conſecuti ſunt* *."— They had, with a judicial tone, affirmed the illegality of the pardon, in a vote the 5th May 1679 †; and had ſtated the ſame *judgment*, in the *reſolution* for an addreſs to the king, 24th March 1678. At a conference, after all theſe meaſures had been adopted, they tell the lords, what the pardon is, which is then before them; deſcribe it, as being a calumny upon the king, *illegal*, and an obſtruction to juſtice: Yet, in this very conference, they " *admit* (re-" luctant evidence is always the beſt), that *any* " *change* of *judicature* in *parliament* is of per-" nicious conſequence to the king, and the " people."

The pardon was never judicially *declared* by the lords to be illegal; a diſpute aroſe concerning the right of the biſhops to give judgment upon that plea, and the parliament was diſſolved.

* Cicero, Epiſt. ad Fam.

† Two things are not a little memorable in their enquiries preliminary to this vote, enquiries inſtituted upon the 28th of April 1679; the firſt is, that a committee *examine precedents*; and the ſecond, that, relying upon the *negative uſage*, they report ſingly the fact of *no ſuch pardon* having been ever iſſued—and this, forms the baſis of their ſubſequent vote.

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From this, which is an accurate ſtatement of the fact as it was left at the diſſolution of that Parliament, what can be more evident, than *firſt*, that in affirming the pardon to be illegal, " and " *therefore* demanding Judgment *accordingly*," before the culprit was *heard* by the Court, theſe public inquiſitors and accuſers uſurped a *judicial* character—became Judges in their own cauſe—and reduced the Houſe of Peers into the mere inſtruments of their will?—*Next*, that in diſabling any " *Commoner*" (friend, or advocate) without *their* leave, to argue in ſupport of this plea, they were guilty of a moſt cruel oppreſſion?—But is it leſs clear, that whatever *ſenſe*, and *policy*, may be found in diſabling ſuch a pardon, there was not a colour of *Law* for the diſability; and that no precedents could help them beyond the *negative propoſition*, that no ſuch pardon had in fact iſſued? which *negative uſage*, you, Sir, and your ſupporters, rejected the other day with ſcorn, as no advantage at all to the point made by thoſe who repreſented the impeachment of Mr. Haſtings to be at an end. It was lately urged by a moſt able, though young debater, who is of our profeſſion, " that what happened in this caſe of " the pardon, was a decided precedent of that " common ſenſe, and public ſpirit which muſt " for ever challenge the complete *effect* of an " Impeachment, as well as the *name* of it." He added, " that what the Commons voted at this " period, was *recognized* as Law by an Act of " Parliament at the *Revolution*."

In the firſt place, nothing is more clear than that the Act in queſtion paſſed many years *after* the Revolution (in the 12th of *William III.)*; and is, of itſelf, a complete evidence *againſt* the ſuppoſed legality of the doctrine affirmed by that vote: For it is a *new* Law, and it is *not* a *declaratory* one. But there is a very material fact, which never has been once noticed in the debate; and it is, that *at the Revolution*, when a laudable anxiety was exerted for the *declaration* of all eſſential and *legal* claims, affecting the King's prerogative, and liberties of the ſubject, a Committee who prepared heads for the *Declaration of Rights*, had made this, one of them:— "*No pardon to be pleadable* to an Impeach- "ment†;" but, "*for divers, and weighty rea-* "*ſons*, they omitted it in the *Declaration* * it- "ſelf:" Nor is it either in the *Bill of Rights*, or in the *Bill of Indemnity*. Indeed, if the words had ſtood, they would have pointed rather at a *new*, than a *declaratory* Law; eſpecially as the Report had ſeparated this article into a different claſs from that of powers which it affirms to be illegal. The Commons took the hint from their Committee, and would not riſk, in the *Declaration of Rights*, their own *judicial* oracle againſtthe *legality* of a pardon, as pleadable to an Impeachment;—which oracle *they* muſt therefore have conſidered as a *fiction*, though ſalutary, and conve-

† 2d Feb. 1688.—The article is adopted by the Houſe, for under it is written—"*Agreed.*"

* As they inform the Houſe, themſelves, in a ſecond Report, 7th February 1688.

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nient. The commons, though for a time averſe to the only expedient that remained, that of a *new law*, had recourſe to it in the end, and thus admitted, that grounds of *policy* injurious to the eſtabliſhed right of the ſovereign, could not be received by the good ſenſe of the conſtitution as grounds of *law*, till the legiſlature had enacted them.

Sometimes, however, the queſtion was a little ſhifted the other day; for it was put thus—(but it was a diſtinction without a difference) "Let the king ſtill have a right of diſſolution "*uncontrouled*, but let the right of impeach-"ment be equally *uncontrouled*. The diſſolu-"tion of parliament does not, of neceſſity, mark "the termination of an impeachment, and the "two rights would not claſh in the leaſt, unleſs "this extravagant effect were given to the "king's prerogative by a ſide-wind, an effect "not eſſential to it, and which is never to be "ſuppoſed a part of its view." This begs the whole queſtion upon the end of an impeachment, as *reſulting* from the end of a parliament*.

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* But why ſtop at the continuance of an impeachment, in the teeth of a *diſſolution?* Why not refuſe *the right of diſſolution*, or even of *prorogation*, *pending an impeachment?* Will any man tell me, that both of them are not injurious to

The next and *third* principle gives a death's wound, in my opinion, to that ſtability of rule which is the ſafe-guard of us all againſt any abuſe of power, but moſt of all in criminal proceedings.

III. " *That a more liberal mode of reaſoning is* " *neceſſary upon* CONSTITUTIONAL *principles* " *of* LAW, *with a political view to their im-* " *portance, and particularly againſt offenders* " *of ſtate.*"

The perfection of rule is, that it looks more at the uniformity of juſtice, than at the policy and ſpur of redreſs to a particular miſchief.—No court in this mild government thinks it humiliating or dangerous, to give the loweſt or the higheſt culprit an equal ſhare of its preſump-

the right of the commons, as public accuſers? One of them ſnifts the accuſer, and may convert him into a partiſan for the culprit; the other may diſarm the evidence by delay, or tire out the accuſer: It is true the king muſt have a parliament again in three years;—but three years form an interval much too long for the ſafety of an impeachment.—Indeed, I confeſs, it has always appeared a very inadequate proviſion for the liberties of the ſubject, that, as the law was framed in *king William*'s reign, the king is *now* able to ſuſpend a parliament for any time ſhort of three years; nor does it ſtrike me as a law that has enacted the *Bill of Rights*, in that part of it which had ſtipulated, that parliaments were to be held *frequently*.

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tions in favor of innocence;—of its jealouſy againſt evidence of guilt;—of its guard over all the eſſential forms, and barriers of juſtice, in the *mode* of reaching his fortune, his character, his freedom, or his life.

I know it has been often contended, that when the legiſlature aſſumes a judicial character for the ſafety of the public, it may diſpenſe with judicial rules, and (as it was profeſſed in the *Earl* of *Stafford*'s attainder) " that he, " who, deſerving to die, ſuffers by an act of the " whole government in its parliamentary form, " has a juſt fate, though rules and principles " of eſtabliſhed law, either in the evidence or " deſcription of his guilt, may have been " violated."

But, at leaſt where both houſes act in their divided and ſeveral functions of accuſer and judge againſt any individual, we are no longer free, if the rule can be relaxed, or ſtrained, or invented, or denied, as the importance of the *political* object may ſuggeſt.

The ſword of this calamity hangs over us.

IV. CONSTITUTIONAL RIGHTS *have leſs of rule in them, than rights of a leſs intereſting nature, and may acquire more or leſs weight from the exigencies of political convenience, to which they are applied.*

If *Conſtitutional Rights* could be thus meaſured, all diſtinctions between future policy and exiſting rule would be loſt, and the good faith of public ſecurity would be ſhaken to the root; every link of that chain which unites the various and rival powers of government would be endangered, and we ſhould expoſe this beautiful ſyſtem, either to the deſultory hand of caprice (which is perhaps of all tyrannies the worſt), or to the caſual impulſe of party-violence.

There is nothing more delicate, than how to adjuſt, and limit this argument of *convenience*; when it is preſſed in aid, as an evidence of *right*. Where there is a reaſonable doubt, which of two oppoſite rights can prevail in point of law, the topic of *convenience* may determine it; but when there is mutual inconvenience, and the right is clear upon one ſide, but very diſputable on the other, it never can, without infinite peril, be weakened in its effect by the diſcuſſion of more or leſs inconvenience, as between the right which is clear, and that which is diſputable.

The

The *inexpediency*, ancient, as well as modern, for it muſt be ſo argued, of ending an impeachment by the diſſolution of parliament, has been ſtated as being univerſal and clear of doubt. If this were true, it would not ſhake the legal conſequences of an eſtabliſhed right. But if that view of the ſubject is purſued, it will appear, that many reaſons of *convenience*, and of *juſtice*, may be adduced in ſupport of a legal doctrine, which appears to be ſo indiſputable, that no evidence of impolicy reſulting from it would move the rock upon which it ſtands. I have ſaid, that in treating the ſubject of this *expediency*, we muſt in part carry it back to ancient periods, and eſpecially to thoſe in which the right was firſt aſſumed. For in conſtruing an ancient right, or principle of law, the policy of them, when they *were* ancient, is a good and ſound argument in their favor, as binding rules, till the legiſlature takes off the fetter; though, by ſubſequent laws, that policy may be weakened or deſtroyed.

Let us then firſt imagine the interval of three or four years:—I am here going back to early periods, becauſe I am aware, that, by an act of *king William*, a parliament is now to be called within

within three years; but I have a right, upon ſuch an enquiry, to look back at the interval of more than *ſeven years* between the parliament that was diſſolved in 1515, and the next;—of more than *five and a half*, between the parliament that was diſſolved 18th March 1580, and the new one;—of more than *four and a half*, between that which had a ſimilar fate upon the 20th March 1588, and the ſucceeding one;—of more than *five and a half*, in *king James*'s reign, between the parliament that ended 1ſt June 1614, and the next;—but above all, of *twelve* years in *king Charles*'s reign, before the civil war *.

Let us imagine all the witneſſes dead whom the culprit was to have called in his further defence; let us put the caſe of a *diſſolution* at the point of croſs-examining an important witneſs for the accuſer—his evidence has made its impreſſion—the court is at an end, for a time at leaſt—the interval is long—and the witneſs dies.

* In *Streater*'s *caſe*, 5 Car. II. 1653, a judge expreſſes himſelf thus:—"If an order in parliament ſhall be in "force after the diſſolution of a parliament, and there be an "order for the commitment of one or more, I pray which "way can the ſubject be relieved but this way—in caſe we "ſhould live to ſee a parliament but once in an age, as in "the latter end of *king James*, or as in the reign of the "late king?" *State Trials*, vol. II.

Let

Let us imagine the culprit a popular favorite; the king his oppreſſor, by a corrupt houſe of commons; and the impriſonment, by a *judicious* number of theſe *diſſolutions*, an impriſonment of ten years, or indefinite (as of courſe it is), at the mercy of his royal perſecutor;—I would aſk, if demonſtration would not be required, before ſuch a tyranny could be admitted, as the effect of his legal power in diſſolving the parliament?

Whatever tends to aggravate the miſchief, not only of *delay*, but of any other, and *peculiar* ſeverities impoſed upon the culprit under an impeachment, for the ſake of public juſtice, ought certainly to be avoided, unleſs they are eſſential to the nature and ſoul of that proceeding.—I hope this principle is correct; I am ſure it is juſt, and humane—"*bonum facilè crederes.*"—Let it be applied: It is a very peculiar circumſtance of advantage given to *this* accuſer, that, as the public trial is watched by him, he may not only, at a convenient minute, recal a charge which he is not able to ſubſtantiate, but may accuſe again, and again, upon points abſolutely new: Upon every *adjournment, and prorogation*, as a witneſs drops, or comes forward, this right may be exerciſed; but if the king *diſſolves* a parliament, and for-

bears to call one (ſay *for two years and a half**), the impeachment ſtill *depending*, and liable to be *reſumed* †,—how does this advantage accumulate againſt the devoted head! No public intereſt (which, in ſome few caſes, it *may* accompliſh) can atone for ſuch a deep wound in thoſe general principles of mercy and benevolence, which elevate our criminal juſtice above that of all nations upon earth. If it be ſaid—that between one parliament and another, the interval is now become extremely ſhort, not only in point of habit, but from various political neceſſities; which make it, in effect, almoſt impoſſible for the king to diſpenſe with a parliament beyond the uſual period between the new writs and the return: Yet can I fairly be told, that even ſuch an interval *may* not, by influence upon the new and general election,—upon the new and elected ſixteen peers of Scotland,—or upon a new batch of Engliſh peers created within the interval,—turn the fate of the culprit?

There is another powerful objection in point of *juſtice* (which I hope is *convenience* too, and the

* *Charles the ſecond* laid aſide parliament for upwards of *three* years before his death.

† To impriſon "till delivered by the houſe of lords," if it extends to the *next* houſe of lords, is to impriſon "during "the king's pleaſure;" which is directly againſt the "*petition of right*:" as the *Earl of Danby* well argued.

only

only convenience that will be named in criminal proceedings) to the continuance of impeachment after a new parliament. The diſcretion of the commons whether to continue, or abandon the impeachment, if they at all exerciſe it by a due examination of the evidence which has been heard, is to depend upon *written evidence* at beſt; whereas, the original accuſers *heard* the evidence, and marked its impreſſion upon their own, as well as the public mind. The judges, who are new (the peers of Scotland, for example, recently elected), will determine upon written evidence alone, the guilt, or innocence, (and as it may be in ſome caſes,) the life, or death, of the culprit.

It may be ſaid, that *adjournments* and *prorogations*, indiſpenſible to the power of the lords, and the power of the king, may alſo be of the ſame prejudice. But they are eſſential parts of the conſtitution, and eſſential defects of impeachment, co-æval, as far as we can trace them, to the origin of that proceeding.—Shall we, therefore, ſuperadd, upon refined, and ſtrained analogy, the accumulated prejudice of all thoſe cruel differences againſt the perſonal freedom of the ſubject, which a new parliament may produce?

We are told, with an ingenious fallacy, that *vivâ voce* evidence is not univerſal, or eſſential,

in other courts; that judges aggravate, or mitigate puniſhment, upon *written* evidence, delivered in the form of an affidavit;—that every judge who makes a *note* of that which he *hears*, depends ultimately upon the *note*.

Here two things are blended into one. Where the court has a diſcretion in the meaſure of puniſhment, the legal evidence of mitigating, or of aggravating circumſtances, preſents itſelf in the form of an affidavit.—But the ſecond propoſition, which has not the leaſt analogy to the firſt, is a perfect miſtake.

For, upon every indictment, before the fact of guilt can be eſtabliſhed, though he takes a *note* of the evidence, he has a *memory* of his own to accompany that *note*; and he never depends, in ſtating facts, from which a verdict of guilt, or of innocence, may be inferred, upon the *memory* of *others*, who heard what he, neither actually heard, nor could have heard, himſelf.

But if it were otherwiſe, it would not apply to this caſe, in which the peers are alſo juries upon the important queſtion of the *fact*;—aſſiſted by *notes* of their clerks, or agents, but neceſſarily enlightened, if their department is well executed, by that, which no written evidence *can* record;—by their perſonal comment upon the demeanour of the witneſſes,—by the impreſſion

firſt made upon underſtandings preſent at the ſcene, when the facts are brought out, and compared.

If the *note* of thoſe who heard, were ſufficient, as a guide of others, who neither heard, nor *ſaw* the witneſſes, why not receive univerſally upon impeachments, written evidence, taken by delegates, or committees, in Weſtminſter Hall, and brought into the houſe of lords upon the faith of *their* accuracy? Why attend theſe trials? To thoſe who don't *hear* the evidence, it is, merely *written* evidence, or it is the looſe *memory* of others;—which is even worſe.

Extreme caſes are liberal and fair illuſtrations of a doubtful rule; which is preſſed, upon the topic of convenience: And the queſtion is not leſs fair, than it was ingenious, which one of the diſſentient lawyers addreſſed, if you remember, to the chairman of the committee;—"How "could he, if ſpeaker, inſtead of chairman, "and if not in the laſt parliament, give a caſt-"ing vote upon the delicate queſtion of pro-"ceeding in the impeachment, or dropping "it?"—The *diſcretion* of this public accuſer, is a very important branch of his *right*, and participates, in that extent, the *judicial* character: but where can the materials of ſuch a diſcretion be found, by thoſe who are ſtrangers to the evi-

dence, and the arguments, in a cauſe which they never heard, and in a court which they never attended?

But, without any ſuch illuſtrations as theſe, the leading features, and principles of our conſtitution, prompt us to give our anceſtors credit for *policy* in that ſyſtem of check which they have impoſed upon *all* the rights of government, and which rights are ſeldom abſolute, or indefeaſible, in *power*, though in theory they admit of no limitation; becauſe they are met, and counteracted, by the effect of rights, and competitors, equally independent.—Let me aſk of *you*, who know the conſtitution ſo well, if there is any one feature of it more prominent, than a mutual jealouſy of all the eſtates that form the government, and a mutual check, univerſally operating between them, in the original frame of their inherent powers?

I have the honour to be,

SIR,

With perfect eſteem,

Yours, &c.

LETTER THE SECOND.

" A repreſentative ſhould never ſacrifice his *unbiaſſed* opi-
" nion; his *mature* judgment; his *enlightened* conſcience,
" to his *electors*; to *any man*; or to any *ſet of men living*."
Mr. BURKE's *ſpeech to the Electors of* Briſtol, 3*d Nov.* 1774.

SIR,

IF the *general principles* which I have taken the liberty of examining, are miſconceived, and ſome of them (particularly the laſt, which confounds political expediency with conſtitutional right) queſtionable, at leaſt, in their application, upon what *other* grounds can it be aſſerted, that the impeachment againſt *Mr. Haſtings* proceeds where it left off?

We ſhall, at leaſt, find theſe *other* grounds, in fact, as *technical*, as thoſe which are ſet up againſt them are deſcribed by the *laymen* to be: But I ſhall hope to convince the reader, that not only they are *techinal*, but *falſe* analogies; and that ſolid principles, rooted in the genius of the conſtitution, deprecate the continuance of this, or of any impeachment, *after the evidence has in part been heard.*

It was inſiſted—" That parliament is never
" extinguiſhed, and that it never *dies*;—that it
" *ſleeps*,

" *ſleeps*, after a *diſſolution*, till the king's prero-
" gative ſhall awaken it;—that peers have ſtill
" the *inherent right* of demanding to ſit in judg-
" ment *, as well as to exerciſe their legiſlative
" character, when the next parliament ſhall
" come into action;—that it is the *people* who
" impeach by their *legal organ*, the repreſent-
" ative; and that it is the *people* who reſume
" by a new repreſentative, their function as
" public accuſers." It was compared to the *attorney general*, and the *king's indictment*, pre-ferred by *him*. The idea of conſidering the popular elector as loſt, upon conſtitutional principles, in his elected repreſentative, was treated with ſucceſsful ridicule by one of the moſt eloquent ſpeeches that perhaps was ever delivered in parliament. As I had the misfor-tune to be the object of that ridicule, I have re-examined what I ſaid, not only without pre-judice in favour of it, but with an apprehenſion that I had been in the wrong when I ſaid—
" that I would refuſe the character of *agent*, or
" *attorney*, for the people of England;—that I
" knew of no commons but thoſe who ſat as a

* In the ſecond volume of *State trials*, p. 210, upon a *habeas corpus* in *Streater's caſe*, *Lord Chief Juſtice Rolle* ſaid expreſsly,—" That a Parliament was a *new court*, appearing,
" and ſummoned by *new writs*;"—which is alſo a direct an-ſwer to an aſſertion made in the debate—" That a court of
" parliament would be *ſelf-reſumed*, when the parliament ſhould
" meet again."—And where *(unleſs in Ireland)* is the *inherent right* of peers at the *time* of the *diſſolution*, who are created *after* it?

" houſe

" houſe of commons *;—that I conſidered " them as having a very aweful truſt repoſed in " them; as repreſenting the popular ſcale of the " government, but as being independent of any " popular controul over them, and as being " equally independent of their predeceſſors in a " former parliament." In other words, " that I " conſidered them as the commons, or people " of England, appearing, deliberating, and " acting, for the popular intereſt, in the moſt " practicable form which the wiſdom of our " anceſtors, and the genius of the conſtitution, " had been able to model."—On the other hand, in this view of them, no tyranny is to be feared;—the right of petitioning;—the popular ſentiment abroad, upon meaſures of alarm;—the fear of its effect upon a general election, (that political and very aweful teſt,)—are wiſe, and provident checks upon this power of the commons; but their conſtitutional independence of the *elector* (in a local, or general ſenſe of the

* *Mr. Burke* has touched this delicate ſubject with a maſterly hand, in his " *Thoughts on the cauſes*, &c."—" A po- " pular origin cannot be the characteriſtical diſtinction of a " popular repreſentative.—This belongs equally to *all* parts " of the government. *The king is the repreſentative of the peo-* " *ple*.—So are the *lords*; and ſo are the *judges*.—They are " all truſtees for the people.—The forms of our government, " and the perſons who compoſe it, originate from the people. " The *virtue*, *eſſence*, and *ſpirit*, of a houſe of commons, conſiſt " in its being *the expreſs image* of the feelings of the nation."

term)

term) is perfect. *Mr. Burke,* indeed, in the pamphlet juſt quoted, recommends, " a *detailed,* " and *ſtrict* attention to the repreſentative, in " counties, and corporations, who are to form a " *political ſtandard* of judgment, by *ſyſtem,* upon " his conduct, which conduct is to be known, " in part, by an accurate liſt of the votes *."

This, if it had not been written by an approved, and zealous advocate for political decorum, would have ſtruck me as a wild, and, at leaſt, as a very unconſtitutional, reſtraint upon the *independence* of the commons in parliament.

As to the opinion delivered by me in the *debate,* I religiouſly perſevere in it, and cannot repent of it, or think it worthy of ridicule, if a little more attention is given to it, than is due, perſonally, to *me.*

But it has been ſaid, " the commons impeach " *in the name of themſelves,* and of *all the com-* " *mons of the realm.*" This proper, and empha-

* One peculiar benefit, and according to *Monteſquieu,* one efficient cauſe, of the *repreſentative* character, is, that it guards the conſtitution againſt this very idea of a *political ſtandard* upon the meaſures of government, attempted by the people at large; who cannot form it with accuracy, and judgment, or make the attempt without anarchy, and miſchief.—The *habit* of political *diſcuſſion* is not for *them,* and they have put it into better hands; though it is, upon great emergencies, their *excluſive* privilege, to *decide*;—by their *feelings,* more than by their *opinions.*

tical

tical deſcription of the repreſentative character which they hold, adds not a ſingle feather to the power of the conſtituent, who is bound in every one act, by the independent energies of that mind which he has entruſted. The *commons in parliament* are, as *Mr. Burke* expreſſes it, in the note juſt quoted, by "*expreſs image*," the *commons of the realm.*

I agree, that we are the *legal organs* of their will; but of their will, as communicated, and implied, in our own. When I ſaid, "that we had "no ſuch character as that of their *attornies*, or "*agents*," I meant, and explained myſelf to mean, that after we took our ſeat, we could not be at all bound by their commands, or influenced by their wiſhes, againſt our own judgment*;—that we could not be diſowned, or abandoned by them;—and (which is the moſt important circumſtance) that we could not be touched by what our predeceſſors, in the repreſentative character which *they* had exerciſed, had ſaid, or done, if it had not been ſealed by the legiſlature. The caſe put, of the *attorney general*, is deciſive to mark, not the analogy, but the diſtinction:—"If *he* dies, the ſuit proceeds, "or may proceed where it left off:"—True;—

* An opinion countenanced by *Mr. Burke*, and ſupported with his accuſtomed abilities, in a perſonal ſituation of his own, recorded by himſelf in the paſſage which I have borrowed, and placed at the head of this letter.

but is the *attorney general* independent, either of the king's pleaſure, or of his prédeceſſor in office? The king may diſplace him at a moment; and he is bound by the acts of the former attorney general.—Why? becauſe the king is bound by them, as acts of his own, through *his own ſervant*, which *he* never can recall. But I conceive it an eſſential part of *our* character, that we have no ſuch fetters upon *us*; that we are conſtitutionally *perfect ſtrangers* * to the commons who ſat in a parliament that is no more; and that we are not even *ſuffered* by the conſtitution to give them credit for any one of their proceedings, let it have been ever ſo wiſe, deliberate, ſalutary, or acceptable to ourſelves.

It was in this view, that I marked the various inſtances, in which, though it might be extremely inconvenient, the new houſe of commons were *diſabled* by the ancient, and modern principles of parliamentary law, to carry on the chain of proceeding from the link at which it was left, when the former parliament cloſed:—Nor was it only, as a part of the legiſlature, in framing bills, or in the appointment of *committees* † for any other purpoſes;

* In *Streater's caſe*, the words of *Chief Juſtice Rolle* are theſe: "An order in parliament is not binding in ſucceſſion. "—How ſhall the next parliament *know* of a former parliament's order?"

† In the caſe laſt quoted, the *Chief Juſtice* argues from the analogy of *committees* againſt the continuance of an order to impriſon

purpoſes; but as a houſe of commons tenacious of all its ſeparate privileges, that it ſuffered, by force, that inconvenience.—What becomes of the *legal organ*, when the commitment for a ſingle day will atone for the moſt atrocious act of diſobedience, or of inſult, if the day is cloſed by a diſſolution of parliament?—What becomes of it, when a day having been appointed for the attendance of a culprit, if the day never comes in that parliament, he, the culprit, is free as air *? —What becomes of the *legal organ* when a bill of attainder has paſſed the houſe of commons, after as tedious an enquiry as even preceded this impeachment? Could it be ſent up, in that ſtate, by the next houſe of commons? Yet, in bills of attainder, the very nature of the expedient points at a culprit of more iniquity, and aſſumes a demand of more preſſure upon the juſtice of the kingdom, than where impeachment is preferred. Put the caſe, that ſuch a bill had been ſent up to the lords, and had paſſed *their* aſſembly too; but that before the king had given aſſent, the parliament had been cloſed—Could

impriſon by parliament, as a court; and pronounces *judicially* that both are at an end when the parliament has been diſſolved. "*We* do not reverſe" (are his words) "the order of parliament, it *is* reverſed by the parliament's diſſolution."

* 17 Cha. II. 1665. The *king againſt Prichard*. 1 *Levinz*, 165. It was held by the court of king's-bench, that even *prorogation* had this effect upon a commitment by the lords for a contempt; and it was diſtinguiſhed in that reſpect from writs of error.

the bill be offered by the two houſes united, in the next parliament, for the royal aſſent?

I am perfectly aware, that in every caſe of bills, there is a *rule* which treats them as being imperfect acts of the entire legiſlature, and *therefore* diſables the continuance of them, unleſs by the ſame parliament; but *why* ſhould the diſability of their continuance reſult from their legal imperfection, if the new houſe of commons may acquire poſſeſſion of the evidence, or may agree to the wiſdom of the original proceeding? —Why ſhould not they tell the lords—"We "think it ſafe, to offer the bill as it ſtood in the "laſt parliament; many of us formed that bill; "the reſt of us are maſters of it by conſultation, "and report."—"No," the conſtitution anſwers them,—"you ſhall ſee, in all your functions, "with eyes of your own, before you act in pro-"ceedings that are intended ultimately for a "law." In *attainder*, the miſchief reſulting from a *diſſolution*, is preciſely the ſame in its nature, but heavier in its degree. There too, the commons are more than accuſers upon *probable evidence* (which is ground enough to juſtify an *impeachment*); they are *judges*, though in a legiſlative dreſs, and pronounce the culprit guilty of a capital offence, as a delinquent of ſtate, when they paſs the bill. If it ſhall have paſſed the lords, that ſame aſſembly, who upon the impeachment are judges, and without appeal—are

judges

judges again, though in a different ſhape, and judicial aſſeſſors to the commons: If they agree, it is the united, and *judicial* authority of both aſſemblies. In a bill of attainder it has been found expedient, (and, though it is a delicate power, I hope it will never be abandoned,) that a legiſlative controul, of more latitude, ſhould reach an offender whom the rules of judicial policy would exempt from puniſhment.

Here, then, is a caſe that cries aloud againſt the power of a *diſſolution* to ſuperſede the whole *trial*, and challenges to the public ſecurity, that no ſuch expedient ſhould intercept the juſtice of the kingdom; but who ſhall tell me, that *Lord Strafford*'s bill of attainder could have proceeded, if the king had cloſed the parliament before that bill had obtained the royal aſſent?

I have now diſcuſſed every topic of reaſoning which I can recollect, upon the various points of the debate, independent of that *uſage* which is, in other words, the *courſe* of parliament.

Here it was pronounced a fatal defect in thoſe who repreſented *uſage* to make an impeachment, and the parliament that gave it birth, die together, that no *clear tenor of uſage* could be found in ſupport of their hypotheſis.

But

But ſurely, the *onus probandi* has been ſhifted in this objection, and *clear uſage* has been required from *our* ſide of the debate; though it is neceſſary to require it from *yours*, which is to ſupport, at leaſt, a departure from the original principles of a new repreſentative, unfettered in *every other* imperfect proceeding, by the act of his predeceſſors who had begun it, when *they* had a character equally independent; and the argument for continuing *this* impeachment, begins with no advantage-ground, if it can be ſaid with truth, in oppoſition to its advocates, —"*You* have no clear uſage for *continuing* an "impeachment, after evidence, and *in ſtatu* "*quo*; that is, where the evidence broke off in "a former parliament."

It is an admitted fact, that impeachments are as old as the 10th of *Richard the ſecond* at leaſt. But from that period, not ONE of them till 1678, has been continued in the next parliament; and even to this hour, no ONE impeachment has ever been taken up in the next parliament, where *a ſingle witneſs* had been examined in the former. Is *negative uſage* of this kind, inſignificant, where the *general principle* of diſcontinuing what the former houſe left imperfect, is collected from ſo many *poſitive* inſtances;—in oppoſition to the ſame topic of *ſalus populi*, or *ſtate-neceſſity?*

Upon

Upon the argument of that captivating plea which has been uſed againſt the king's protection of his favorite miniſter, I have taken pains to diſpoſſeſs myſelf of all prejudice; and, like the conſtitution, to look on both ſides, particularly in that view of the ſubject which points at the *diſſolution*, as enabling in effect the very ſame *pardon* to exiſt, though in a different ſhape, which the law has diſabled when it can ſhow its face upon the record. But I am not ſure, that it would, upon the whole, be wiſe for the public ſecurity, and for our liberties, if an act were to paſs that ſhould in future diſable *this* effect of a *diſſolution*, unleſs with many guards againſt the abuſe of that new arrangement: Of this I am perfectly ſure; that it may be converted into an engine of oppreſſion, by delays, and changes in the judge, or the accuſer, that would be deeply injurious to the culprit.

Beſides, the whole argument aſſumes, that of courſe the king will make a bad uſe of his *prerogative*; and that no houſe of commons will ever make a bad uſe of their "*privilege*;" to uſe the faſhionable word. I am as firm an advocate for the popular ſcale of the government as any *whig* in his majeſty's dominions; but I deſire to be no better *whig* than *Serjeant Maynard*, and *Lord Somers*, who tempered the *Revolution* by thoſe reciprocal guards between the monarch, the ariſtocracy,

ariſtocracy, and the commons; upon which alone, that liberty, which is the animating principle of our conſtitution *, will for ever depend.

The independent character of each eſtate, in all its branches of power, is the vital principle of our conſtitution. The commons have the admitted power to *accuſe*, and recall the accuſation at pleaſure;—the lords are to *judge*, and, like other courts of legal juriſdiction, by rules of their own;—the king has the excluſive right of *pardoning* the ſentence.

It is agreed, that as the ſame commons may at any time cloſe their impeachment by *their* diſcretion, it muſt of courſe drop in the next parliament, unleſs revived by the diſcretion of their ſucceſſors;----and that a new election *may* return to parliament thoſe who did not, and could not, hear the evidence upon the impeachment; thoſe who cannot, therefore, make up their minds to a judgment, well informed, whether to retire, or proceed.

* But after all, "*we have no conſtitution*;" that is, we have not a "*body* of *elements*, formed by the *people* before "the government was conſtituted, and enacting article by "article what the government ſhould be;—we have there-"fore a conſtitution to make;"—that is, the *people* are to make it, according to the *rights of man*, which are to have the *lion's part* in this new *body of elements*, that are to conſtitute a new government.—Another *jeu d'eſprit* of *Mr. Paine*, inviting us to deſtroy the *government*, in order to have a *conſtitution!*

It is, it muſt be, admitted, that in every function of power, exerciſed by *other* courts of juſtice, a political demiſe of the entire court ſuperſedes the imperfect proceeding, and requires a new one, even if the record is preſerved. This originates in the idea, that it is not ſafe to give a right of judgment, when the parties have not been completely heard by the ſame court.

If a cauſe in equity is upon the point of a decree, and the chancellor who reſigns gives up his *note* into the ſucceſſor's hand, it muſt be completely re-argued. In criminal proceedings, I ſhall not repeat the effect of a diſability upon judges, or juries pending the ſuit.

But the analogy of the king's demiſe, and its fatal effect upon all proceedings at *law*, before the act of parliament, has never yet been anſwered. Upon what principle was a culprit, who had been tried upon *indictment* for high treaſon, protected by *that* ſpecies of *diſſolution*, from the effect of all *evidence*, heard, and received againſt him at the former trial, though he was called upon to *anſwer* again? Upon what principle, but that of conſidering the court as new to the firſt proceeding?—But would a peer, in thoſe days, have been tried by a different principle *for the ſame offence*, before the houſe of lords, upon the removal of an indictment followed by the regal demiſe?—If he would not, I aſk, why in the caſe of an impeachment *for the ſame*

offence, and that impeachment followed by a *diſſolution* of the parliament who try him, unleſs upon topics of *political* convenience, which cut both ways, and are at leaſt no grounds of a *judicial* reſolution?

Of *uſage*, precedents are material, and ſolid proofs; though I by no means agree to what I heard in the debate, that of courſe the *laſt* reſolution was the law. It is not ſo in courts of legal juſtice—for though credit is given to it, yet the judges are not bound by it, if it is not law. But, on the other hand, I can as little agree to a moſt extraordinary poſition which the ſame debate, rather fertile in paradox, announced, and with popular effect; namely, that we are in a caſe of "*privilege*," and muſt look at no journals but our own.—What is meant by the word "*privilege*," which is never to look before it leaps, and is to affirm *judicially*, where it has *no* judicial powers, what a court who *has* them *is to do*, *or ſay*, without conſidering what it *has done*, *or ſaid*; is above my *unprivileged* apprehenſion. Indeed, I never heard that a right of impeachment, though it certainly is an *excluſive juriſdiction*, was "*privilege**"—a term which

* The term ſtrictly, and originally means "a *perſonal advantage*, by a law, which diſtinguiſhes *one man* from *other men*."—The Roman laws of "*privilege*," are "leges de *privis* hominibus latæ." Cic. *de Leg.*—It extended itſelf, in a courſe of time, into *office*, *rank*, or any other peculiar deſcriptions of men, but retained its character of being merely a *benefit*, or *gratification*; which the *right of accuſing*, by impeachment, has never been called, as I recollect, before this debate.

I have

I have underſtood as applicable rather to the immunities, and protections of the Commons againſt the courſe of Law, or to their claims of honor, than to a right of accuſing culprits before the public juſtice of the kingdom*. But this, at leaſt, is clear;—that if *Privilege* addreſſes itſelf to a Court of juſtice, and becomes an accuſer, it muſt be governed by the rules of that Court, not only in the courſe of trial, or in the Judgment of Law, but in adjuſting the extent, or boundaries of the juriſdiction.—In telling the Lords, what their Judgment ſhould be upon the *Earl* of *Danby*'s plea, the Commons uſurped upon the rights of that Court, without a ſhadow of authority. When they interfered with a day appointed for the diſcuſſion of his plea, and menaced his counſel, or friends, if they ſhould appear for him in Court upon the argument of his claim, they added inſult, and oppreſſion, to an illegal encroachment. But what is the queſtion here?—It is the *uſage* of Parliament in proceedings upon Impeachment. If this Houſe had once voted a judicial

* In the eloquent and ſpirited Apology to *King James* the Firſt, which Mr. *Petyt* has recorded, (Journ. Parl. 227.) the rights of the Commons, in point of *privilege*, are—freedom of election—freedom from arreſt—and freedom of ſpeech; to which may be added, freedom of acceſs to the King.

propoſition reſpecting the duty of the Lords, and their uniform conduct, *acquieſced in by the Commons*, had been the other way; ſhall we open our eyes to the former, and ſhut them againſt the latter *?

Even in 1678, the Commons (after they had ſtated the pardon as illegal, in an addreſs to the King upon the firſt rumour of it) examined precedents upon the effect of this plea; and reported, that no inſtance could be found of a pardon ſo pleaded. Where could that negative teſtimony be found, but in the *Journals of the Lords?*

This novel idea, of refuſing t look at the Journals of the other Houſe, was not explicitly adopted by the Committee, and *the firſt authority in the Houſe* reaſoned upon a variety of precedents taken from that Court; I ſhall therefore aſſume the right of examining them here.

I am, SIR, &c.

* There is a very curious proceeding againſt *Lord Orrery*, upon the 25th *Nov.* 1669, by which it appears, that the Commons took up, as Judges, an Impeachment *in the name of* two private accuſers, for high treaſon, without conſulting the Lords.

LETTER THE THIRD.

Qui didicit *patriæ* quid debeat, et quid *amicis*,
Quid ſit *Conſcripti*, quid *Judicis* officium, ille
Reddere perſonæ ſcit convenientia cuique.
HORACE.

SIR,

WHAT then does your argument upon theſe precedents, firſt encounter? A very inauſpicious fact, it muſt be admitted; for, by the *lateſt Judgment* of the Lords upon the very point itſelf, an *Impeachment is terminated by a diſſolution*; and the culprits are ſet at liberty.

The reſolution by the Houſe of Peers 1685, is in theſe words:

" Upon conſideration of the caſes of the " *Earl* of *Powys*, *Lord Arundel* of *Wardour*, " the *Lord Bellaſyſe*, and the *Earl* of *Danby*, " contained in their Petitions, after ſome debate " this Queſtion was propoſed—Whether the " Order of the 19th of *March* 1678-9 ſhall be " reverſed

" reverſed and annulled as to Impeachments;
" the Queſtion being put—Whether this Queſ-
" tion ſhall be now put? It paſſed in the af-
" firmative; then the Queſtion was put—Whe-
" ther the Order of the 19th of *March* 1678-9
" ſhall be reverſed and annulled as to Im-
" peachments. It was reſolved in the affirm-
" ative."—The Order ſo reverſed and annul-
led is in theſe words:—" The Houſe taking
" into conſideration the Report made from
" the Lords Committees for Privileges—That
" in purſuance of the Order of the 17th inſtant,
" to them directed, for conſidering whether
" Petitions of Appeal, which were preſented
" to this Houſe in the laſt Parliament, be ſtill
" in force to be proceeded on, *and for conſt-*
" *dering the ſtate of the Impeachments brought*
" *up from the Houſe of Commons the laſt Par-*
" *liament, and all the incidents relating thereto*;
" upon which the Lords Committees were of
" opinion, that in * all caſes of Appeals and
" Writs

* Is it not remarkable, that, aſſerting *all* Writs of Error, *&c.* to continue in the ſame ſtate, they only aſſert *the Impeachments brought up in the laſt Parliament*, ſo to continue? The queſtion upon both, was as to Writs of Error and Impeachments *which were in the laſt Parliament*. But the anſwer is *general* as to all *Writs*, and particular as to *Impeachments*; for this obvious reaſon: Impeachments which had not been proceeded

" writs of error they continue, and are to be " proceeded on *in ſtatu quo* as they ſtood at the " diſſolution of the laſt parliament, without be- " ginning *de novo*;—*and that the diſſolution of the* " *laſt parliament, doth not alter the ſtate of the* " *impeachments brought up by the commons in that* " *parliament.* After ſome time ſpent in con- " ſideration thereof,—it is reſolved, that this " houſe agrees with the lords committees in " that report."

Upon the view of theſe two reſolutions, it is impoſſible, I think, to be denied, that as what they affirm reſpecting impeachments cannot be reconciled, it is the *later* opinion and *judgment* of this high court—" that a diſſolution of par- " liament *does* alter the ſtate of impeachments " brought up in that parliament."

It has been ſaid—That a reſolution to annul, and reverſe a former, does not of neceſſity affirm any *other* propoſition to be law, but leaves the law to its fate, independent of that reſolution; that, for example, the doctrine con-

ceeded upon, or upon which no witneſſes had been examined —fell within the reaſon which applied itſelf to *all* writs of error. They were all upon record, and there was nothing more of them.

tained in the *firſt* reſolution, concerning the *Middleſex election*, is open, though whatever authority may have been given to the doctrine by that reſolution alone, is done away, by the *ſecond*.

This way of reaſoning may, in ſome caſes have its weight, but it has none upon queſtions like theſe, of a judicial nature; for in theſe, if the court gives a judgment, and acts upon it at one period, but reverſes it afterwards, and acts upon the reverſal, it affirms, in effect, the judgment which it reverſes, to be erroneous. Here too ſome of the very peers, at whom the former judgment was levelled, are ſaved from it by the court, in this later judgment, as in the nature of an appellant juriſdiction.

It is true, the petition of thoſe *peers* had ſtated no ground for diſcharge, as reſulting from the effect of the *diſſolution*, but had ſuggeſted *other* circumſtances. The catholic peers, their innocence, and the convicted perjury of *Oates* —The *Earl of Danby*, relying upon the length of his impriſonment, (before he was bailed the 12*th of Feb.* 1683-4,) and upon the want of oath or affidavit againſt him at the time of his firſt commitment.

But the Lords, finding this *Order* of 1678 in the way, took up the conſideration of it; and by *reverſing* it, they, in ſubſtance, declared the Law to be—that by a diſſolution of Parliament, the right of the Commons upon Impeachments, which that Parliament had begun, was at an end in the next.

This reverſal having taken away the controul of the Impeachment over the Catholic Peers, they were left upon the Indictment which had been removed, by *Certiorari*, into the Houſe of Peers, as pending the Impeachment, it could not proceed at law, and the Lords had a controul over it; but a *nolle proſequi* having been obtained, the bail taken upon thoſe Indictments was diſcharged upon the 25th *May* 1685: Upon the *firſt of June* following, the bail for appearance of all the Peers who had been impeached, (the *Earl* of *Danby* included,) and the Peers themſelves, were diſcharged; ſo that here, at one blow, was ended every idea of controul in the Houſe of Commons over an Impeachment, after a *diſſolution*;—it was ended by a *Judgment* of the Lords;—and by an *act* in conſequence of that Judgment, a releaſe of the culprits. *Burnet* ſays,—"The Houſe of "Commons dropt the Impeachment, and *there-* "*fore* the Lords were diſcharged." If that

were true, it would give additional force to the Order of reverſal, as not being neceſſary for theſe Lords, but as being neceſſary, in itſelf, to form a general rule; (at leaſt a ſimilar argument was uſed in ſupport of the Order 1678; namely, that it could make no difference to *Lord Stafford* or the *Earl* of *Danby*, as new Impeachments would certainly have been framed againſt them;) but I can ſee no trace of the fact which *Burnet* intimates, upon the Journals of Parliament.

In that view, and if no other precedents appeared, it would ſeem to be, at the beſt, very improvident, that *we* ſhould affirm a judicial duty of the Lords, irreconcilable not only to this lateſt *Judgment* of *their* Court, but alſo to the *act* which had followed upon it;—though we ſhould give the name of "*privilege*" to our interference.

It has been preſſed againſt the Order of 1685, that it has retained the legal, and reverſed the conſtitutional, part of the Order 1678, by reverſing what relates to Impeachments, alone.

But if the effect of other judicial proceedings can be diſtinguiſhed from the effect of an Impeachment, in clear authority, and ſound reaſoning, the diſtinction gives credit even to the diſcriminating

nating part of the Order 1685. That ſuch a diſtinction between them does prevail, will be marked in the ſequel.

Be this however as it may, there are two grounds, upon which the later judgment would become the law of the Peers, in their judicial character, and of the kingdom.

The *firſt* is, that for the Order of 1678, as built upon the ſuppoſed analogy to that of 1673, there was no colour of law.

The *ſecond*, that after 1685, and *after the Revolution*, credit was given by the Houſe of Peers, upon diſpaſſionate examination, and a *judicial* review, to the Judgment of 1685,—the Commons acquieſcing, and therefore tacitly approving that credit.—This too will appear in the ſequel.

But firſt it may be thought material, to conſider the hiſtorical, or political features of the *age*, in which the Order of 1685 iſſued, and which have been extremely miſunderſtood. I am,

SIR,

With reſpect, &c.

LETTER THE FOURTH.

— Haud illa viros vigilantia fûgit.
JUVENAL.

SIR,

IT has been truly ſaid—that all theſe Peers, except the *Earl of Danby*, were Catholic, and of the King's religion, who had a powerful influence over both Houſes.

The two diſſenting Lords, however, in their Proteſt, threw another imputation upon the Order of 1685, which is, that extra-judicially, and without a particular cauſe, it endeavours to alter a judicial rule, made and renewed *after long debate, Report of Committees, Precedents,* and *former Reſolutions—without permitting the ſame to be read.*

The firſt of theſe imputations (which unqueſtionably is falſe in the fact) accuſes the Lords of *partiality* for the Catholic Peers; and the ſecond, as far as credit may be given to it, ac-

cuſes them of *precipitation*;—in which offence the two Orders may ſhake hands together.

But (it muſt be remembered) the King, tyrant, and bigot as he was, had not offended the Commons at this period, by meaſures of particular *alarm* to the eſtabliſhed religion *; and that the Commons were extremely vigilant in their general ſuſpicions.—The *Duke* of *Monmouth*, indeed, called it a "*pack'd Parliament*;" and Mr. *Hume* ſays, "it was formed of Tories, "or High-churchmen:" It certainly had been thrown very much into the hands of the Court, by the ſurrender of the Corporations, in the laſt reign, and by the odium of the *Rye-houſe* plot, which had made the Whigs extremely unpopular. But there is internal evidence that men of public ſpirit exerted themſelves with laudable jealouſy even in this firſt year of *James the Second*'s reign. I mentioned in the debate, that *Ser-*

* We know, indeed, from *Sir John Dalrymple*'s Memoirs, that before he called his firſt Parliament, he negotiated for money with *Lewis* XIV. and marked, in a converſation with *Barillon*, his determined zeal for Popery. But it appears in the ſame papers, that, in Auguſt 1685, the King told him of the alarm he felt upon account of the jealouſies againſt him in Parliament.—I am aware that ſome doubts have been thrown upon the veracity of this writer; but I wiſh that every hiſtorian ſtood upon ſuch a rock: He refers to original manuſcripts in a *public* repoſitory, to which *others* can obtain acceſs. His work has been long publiſhed, and has never been anſwered.

jeant

jeant Maynard †, who aſſiſted afterwards in forming the Revolution, who was then adverſe to the Court, and who had been one of the Managers in ſupport of *the Order in* 1678 *againſt Lord Stafford*, was in that very Houſe of Commons. We have the note of a ſhort ſpeech delivered by him in this year, 1685, againſt a ſupply:—I will copy the words, to mark in what ſpirit that great lawyer, and ſtateſman, then acted. "There is already a Law, that no man ſhall "riſe againſt the King:—Lords and Deputy "Lieutenants have power to diſarm the diſ- "affected. If you give thus a *ſupply*, it is for "the *army*; *and then may not this army be made* "*of thoſe who will not take the Teſt?*—Which "act is not deſigned as a puniſhment for the "Papiſts, but as *protection for ourſelves*—and "giving this money is for an *army.—I am* "*againſt it.*" *Burnet* ſays, that *Serjeant Maynard*, about the ſame time, was the chief opponent of an act, which made words High Treaſon; and ſpoke with much impreſſion, as well as gravity, againſt this favorite meaſure of the Court: it is inconceivable, that with all thoſe

† This extraordinary and ſuperior man told *King William*, at the Revolution, that he ſhould have ſurvived, if it had not been for *him—the Law itſelf*; and then, being towards ninety years of age, had the great Seal put into his hand, as the firſt Commiſſioner. His capacity and learning were of the firſt rank, and would have done honour to any age.

jealouſies

jealouſies of the King's partiality for the Catholic intereſt,—with his memory, too, of this Order in 1678, and of the advantage it gave to *him* againſt a Catholic victim, he ſhould have ſeen the Lords reverſe the Order in favor of Catholic Peers, without one complaint, unleſs he had conceived the Order to be illegal, even againſt thoſe who were the immediate, and, at leaſt, nominally, the ſole objects of it.

But I muſt beg to inſiſt, that in thoſe times, and in this very Parliament, were ſome good, and ſound Proteſtants. The reſolution they had formed, was to admit of no alteration that would enable a Catholic to enjoy place, or preferment, of any kind, under the Government.

The King had avowed himſelf a Catholic, had gone openly to maſs, and had put Catholics into his army in *Ireland*. We ſhall ſee what an oppoſition it produced.—*Oates*, however, had been convicted of perjury, and his conviction (ſtanding upon evidence unimpeached) had the effect of diſcrediting the rumour as to the Popiſh Plot, upon which *Lord Stafford* had loſt his life, the victim of that perjured miſcreant. This Peer's execution is more a part of the Order in 1678, than has been generally underſtood, as I ſhall prove hereafter; but even after that conviction of perjury, ſo averſe were the *Whigs* to the diſcredit of a popular, and (as they conceived) a ſa-

lutary

lutary fiction, that ſome of the Lords *proteſted* againſt the reverſal of *Stafford*'s attainder, and the Commons would not paſs the Bill; inſiſting, that it was *a legal*, and *juſt attainder*. This I mention as another trait of their jealouſy againſt the Catholic prejudices of their King *.

Yet his firſt addreſs to the Parliament, offered, in very ſolemn terms, to guarantee their property, and *religion*. The neceſſity of that fraud indicates that he was in ſome fear of this very Parliament, for elſe he would have ſpoke out.

But a circumſtance aroſe, which is deciſive to ſhow a jealouſy of the King, and a public ſpirit in many of the Commons. *A full Committee of religion* ſat, and paſſed a vote, *nemine contradicente*, upon the 27th *May* 1685, for the defence of *the reformed religion of the Church of England*; and for an addreſs to have the Laws put in execution againſt ALL Diſſenters WHATSOEVER. The argument in the Houſe againſt this reſolution was plauſible enough, and prevailed; but the addreſs, voted afterwards, was not ſervile, for though it expreſſed a reliance

* *Dalrymple*, in his Memoirs, gives the maſter-key to this dilemma in politics. "Reparation could not be made without throwing diſgrace upon four ſucceeding Parliaments —upon the whole party of the Whigs—and upon many of the Tories; nor could popiſh victories, with ſafety, be allowed in a popiſh reign."

upon

upon the King's word, it marked the *eſtabliſhed* religion, as *dearer to them than their lives*— words (as *Burnet*, and *Hume* ſay of them) very unacceptable to the King.

The next event was *Monmouth*'s Rebellion, in which the Parliament were not more loyal, than it became good ſubjects to be.

Jeffreys indeed, at this time, became a perſonal favorite of *James*, and gave diſguſt by his licentious conduct, as well as cruelty in judicature.

In the month of *Nov.* 1685, the Commons put an affront upon the King, almoſt unexampled, by adjourning the conſideration of his Speech from the 9th to the 13th. In that Speech he had offered an apology for the Catholic officers; and had ſolicited a perpetual aid.— When the day arrived, the Commons voted a ſupply for *preſent occaſions*; but would neither ſpecify the *amount*, nor the *uſe* to which it was deſtined. Upon this, a long debate had ariſen, and the numbers were 250 againſt 125 in favor of the *Whigs*. The very ſame day they divided upon the moſt conſtitutional of all Queſtions— whether to poſtpone the *ſupply*, or *grievances*,— and it was carried (though by a ſingle vote) that

 they

they ſhould firſt conſider the *popiſh officers in the army*. It was then voted—" That this reception " of popiſh officers into the army was againſt " Law—to addreſs* the King for their inſtant " removal, and a Bill for their indemnity, as to " the time paſt." Upon the Queſtion reſpecting the amount of ſupply, *Nov.* 16, 1685, the Court was out-voted, and † 700,000 *l.* ſubſtituted for 1200,000 *l.*

Upon the debate reſpecting the concurrence of the Lords to the addreſs againſt the popiſh officers, the Court prevailed—the King was, however, piqued—uſed peeviſh language, but ſtill dwelt upon his promiſes. At a later period the Commons unanimouſly voted an addreſs to him—the Lords took up the ſame topic of the popiſh officers—the King was preſent, and very much hurt at their freedom.

Fox, then paymaſter of the army (and the lineal anceſtor of your friend, who will make that name immortal), was turned out of his employment, for his vote againſt the Court; and the *Biſhop of London* was removed from the

* The Addreſs is decent and ſmooth; but more was meant by the words than what ſtrictly they expreſſed.

† This was loſt by his continued prorogations, before it had been ſettled.

Council

Council Board :—(We have *heard* of ſuch meaſures in later times.) In the debate againſt the repeal of the Teſt, upon which the Biſhop had given offence, *Jeffreys* the Chancellor, who had inſiſted, that general compliments in the addreſs had precluded oppoſition to the meaſures of Government, was overborne by the Peers, and proved himſelf a coward *. (Cruelty, and cowardice always go together.) Upon this debate, the *Earl of Devonſhire* had ſaid, with a very high-ſpirited ſarcaſm—" That he was for *giving* " *thanks*, becauſe the King had ſpoke out ſo " plainly, and warned them of what they might " look for †."

A little after this time, *Lord Delamere* was acquitted by the Lords, partial as they were, (for it was even a partial ſummons,) without one diſſenting voice—though *Jeffreys*, a perſonal enemy of the culprit, was the High Steward—though it was a favorite proſecution of the King—and though *Finch*, the King's confidential advocate, (confirmed in it by *Jeffreys*) aſſerted, that one

* It was a new ſpectacle, to ſee Biſhops oppoſing the King's will, and *Jeffreys* making apologies. *Dalrymple.*

† He had been very keen againſt the *Earl* of *Danby*, in the Houſe of Commons, but he never complains of the Order 1685 :—he was preſent when it paſſed, without a diviſion; and was not one of the diſſenting Peers, who proteſted.

witneſs, with preſumptions, would convict of High Treaſon*.

I have thrown theſe paſſages together, in order to mark, that whatever general deſcription may have been given of this period, it was by no means without energy, and public virtue.

It was in a part of this period—it was after the popiſh officers were put into the army—that the Order of reverſal (1685) took place, which took away the "*Palladium*" (as it is now called) of the Engliſh Conſtitution. And I again aſk, what lethargy poſſeſſed thoſe who were alive to other jealouſies, that, aware as they muſt have been of the effect which the Order of 1678 produced, in cheriſhing that popular fable of the Popiſh Plot (which they refuſe to diſcredit by reverſing *Stafford*'s attainder)—aware of the immediate benefit reſulting from this Order of reverſal to the Catholic intereſt in the perſon of thoſe Peers—they utter no complaint againſt the Houſe of Lords for this act, and, by their ſilence, brand the Order of 1678 themſelves?—Nor can I too often impreſs upon the public

* We have the King's remark upon this, in one of his private Letters—"He had good luck, and juſt Judges." But *Lord Delamere* was made his bittereſt enemy by this trial. *Clar. Diary.*

attention

attention ſo curious a fact, as the attendance, and popular exertions of that very *Serjeant Maynard*, and in this very Houſe of Commons, who had ſaid againſt *Lord Stafford*—" That what has " been once upon Record in Parliament, may " afterwards be proceeded upon; and that if " there was no precedent, he hoped the Lords " would *make* one."

I am,

SIR,

With great reſpect, &c.

LETTER THE FIFTH.

Atque fatas, aliò vidi hunc traducere, meſſes.
VIRGIL.

SIR,

THE Order of 1678 has been ſtated thus—"It was founded upon a juſt, and liberal "affinity of principle between Writs of Error, "and Impeachments—between Prorogations, "and the Diſſolution of a Parliament. The "particular caſe had not ariſen till 1678, but "the Law of the Peers and Commons then "united, was declaratory of antient principles "marked in the reſolution of 1673; and ſtood "upon the obvious line of difference between "*every legiſlative*, and *every judicial* proceeding. "It *matured the ſeeds* of a powerful, but con-"cealed analogy in the Order of 1673*. It "gave to *appeals and impeachments* a firm con-"nection, by calling them *judicial*; and prompt-"ed this younger plant, the *impeachment*, (with "all its indiſſoluble energies,) to form as deep,

* —— "*Quæ mox cælo properanda ſereno*
"*Maturare datur.*"

"and

" and as tenacious a root as the other. The " union of both houſes too, gives more weight, " and ſanction to the order, becauſe, at this very " time, they were differing upon many other " conſtitutional topics. The reſolution was *en-* " *forced* againſt the *Earl of Danby*, who was " in the tower five years, and ſolicited, in vain, " the courts of law; till *Jeffreys* came, who had " the courage to bail him. It was *enforced* by " the ſolemn trial of a peer, and his execution. " Theſe were times of popular jealouſy, and fer- " ment; but from the violence of this party- " rage, upon very honourable, though miſtaken " jealouſies, we can trace the liberty that we now " enjoy. *Mr. Juſtice Blackſtone* has marked " the year 1679 for the beſt in the annals of the " conſtitution. An abuſe of this power, in the " caſe of *Lord Stafford*, is no proof againſt the " legal, and conſtitutional validity of the power " itſelf. The *Earl of Danby* had no connection " with *Stafford*, or the other popiſh lords. The " king juſtified him, adding terms of the moſt " offenſive inſult, and illegally pardoned him. " The lords attempted a compromiſe—the " commons were firm;—they rejected the par- " don—they turned with ſcorn from the com- " promiſe—they perſevered againſt the culprit, " and carried their point, by making the lords " firſt give an order for his impeachment, and " then paſs a bill for his attainder, if he ſhould

" not appear upon a certain day." To every part of this ingenious, and popular ſtatement I ſhall give an anſwer.

The firſt, and main ſtrength of it, is that *principle*, as it is called, which the reſolution, or *judgment* of the lords in 1673 had pointed out; and which, though pointed ſpecifically at writs of error and appeals, (continuing from one ſeſſion to the next,) extended itſelf to the doctrine of continuing impeachments, in whatever ſtage of the *evidence* they were left *, and continuing after a *diſſolution*.

When the unexampled, and irreſiſtible eloquence, to which I have more than once alluded, was diſplayed upon the general policy of continuing the impeachment, I was loſt in admiration of ſuch talents, and public ſpirit; but when I ſaw that ſame eloquence condeſcending to pick up the order of 1673, as an auxiliary ſupport of the right which he aſſerted, I thought the materials unworthy of the uſe to which they were applied; and very inferior to the artificer. The metaphor of the *ſeed*, which he took from the *higheſt*

* The reſolution of 1678, aſſerted nothing of impeachments *in general:* It aſſerted in ſubſtance only this:—" *the* " *impeachments of the laſt parliament*, upon which *no evidence* " have been taken, ſtand upon the ſame footing as *all writs* " *of error*, which require *no evidence* to ſupport them, but ex- " cluſively depend upon the *record*."

authority

authority in the Houſe, and from the moſt reſpectable of men, reminded me of that miracle which I have placed at the head of this Letter; and which, to do him juſtice, the Poet repreſents to have been a work of enchantment.

In the firſt place, it was truly, and powerfully obſerved, that amongſt the obſolete precedents, to which that reſolution has referred, *not one impeachment* is to be found, though numberleſs impeachments were then upon the Journals of Parliament; and though ſome of them, at leaſt, had not proceeded *in fact*, as I had the honour of proving to the Committee by two precedents, to which no anſwer was given; one of them in 1624, the other in 1660. The effect of them I ſhall not again deſcribe in this branch of the argument—if at all.

But what is profeſſed by the Peers in the enquiry which they inſtituted 1673?—A deſire to know upon a view of precedents, "whether after "an intervening *prorogation*, Writs of error "and appeals could proceed." The words are theſe:——"11th *March* 1672-3—Ordered, "That it be referred, *&c.* to conſider whether "*an appeal* unto this Houſe, either by *writ of* "*error*, or by *petition*, from the proceedings of "any other Court being depending, and not "determined in one *ſeſſion* of Parliament, con-

" tinue *in ſtatu quo* unto the next ſeſſion of Par-
" liament, without renewing the *writ of error*, or
" petition;—and report their opinion unto the
" Houſe."

The anſwer given to this clear and ſimple queſtion, begins (to apologize, I imagine, for the various precedents to which it refers, and which have no application to writs of error, and appeals) by miſrepreſenting, and widening the queſtion referred; which the Lords Committees deſcribe as having extended itſelf, *in words*, to " *any other buſineſs* wherein their Lord-
" ſhips act as a *Court of Judicature*;" and they ſubjoin to the words—" *without renewing* the
" *writ of error and petition*," the words following—" *or beginning all anew*," as if they had ſtood part of the original queſtion.

Then, after ſtating the various precedents, they report thus: " Upon the conſideration of thoſe
" precedents," and of ſeveral others mentioned
" at the Committee (but which never appearing, are as if they never exiſted), they declare it as their opinion, " that *buſineſſes*" (here they drop the words *as a Court of Judicature*) " depend-
" ing in one Parliament, have been continued to
" the next Seſſion of the SAME PARLIAMENT;"
(words of no trivial emphaſis!); " and that
" proceedings thereupon *have remained* in the
" ſame

" ſame ſtate in which they were left."—I have examined, carefully, *all* theſe *precedents*, to which the order of 1673 has referred; and when I reflect upon the uſe that has been made of them, as proving that impeachments after a diſſolution of parliament, *even where evidence has in part been heard*, can be taken up, from the point, at which they left off, in the next parliament, I have no power of language to expreſs my aſtoniſhment!

There is one general remark, which pervades the whole ſtring of them, and it is, that in all of them the continuance is *by order, ſpecially directing it*; which not only does not prove continuance, to be of courſe—but proves the direct reverſe.

It ſeems to have been the regular habit, in *writs* of *error*, upon the firſt complaint, that a *ſcire facias* * iſſued, returnable the next parliament †. This is properly no *adjournment*; it is rather

* What is this but ſaying—" We ſhall take it up, the next " parliament?"—for *they* could not iſſue the *ſcire facias*. The party muſt go to the proper court for that writ; and he could not take it out till the day of meeting at the next parliament was fixed, for it muſt have a return certain.—Is it not then ſaying, " bring the defendant in error to us the " next parliament, by due proceſs, and we ſhall *begin* what " he deſires of us, *then*?"

† It is almoſt a diſtinction without a difference, between the " *next parliament*," in very *ancient* periods, or the " *next* " *ſeſſion*," of a *modern* parliament, in point of *delay*;—parliaments were then very ſhort, and very often held. But, on the other hand (ſays *Lord Hale*), " the *ſeſſions* were then " ſo ſhort, and ſo uncertain, that a new ſeſſion might end " before the day aſſigned for the return of the writ." ——

rather a *notice* when proceedings will be commenced. But in ſome few of the caſes, it is true, that an *adjournment* is ordered. For example, 1 *R.* 2. N° 28. day was given to both parties till *next parliament*, with *all advantages*, and the *matter to ſtand* as *now it doth*. In one of theſe precedents the *ſcire facias* being returned by a *tardè vênit*, another *ſcire facias* iſſued returnable *the next parliament*; ſo that a *ſcire facias*, or the firſt act of proceſs, always gave this interval, to the *next parliament*.—Many other precedents, quoted by *Lord Hale*, mark the ſame idea; indeed, he adds, that a *ſcire facias* in thoſe caſes did not, in fact, iſſue till the next parliament.

Of *precedents*, applicable directly to *writs of error*, there are only *eight* between the firſt of *Richard II.* and the third of *Henry V.*; of theſe *eight*, there is only *one*, in which *proceedings have been had* upon the return to a *ſcire facias*, and a day then given to both parties till the *next parliament*.

It further appears, that upon the 21ſt of *James*, in a writ of error againſt a judgment from *Ireland*, a *ſcire facias* iſſued, returnable the next *ſeſſion* of parliament; and upon the ſame day

Theſe differences afford a very natural reaſon, why the lords committees in 1673 (though moſt of their precedents apply, as far as they go, to a *new parliament*) confine the report *emphatically* to a "*new ſeſſion* of the *ſame parliament*."—"In "the reign of *Charles I.* (according to *Lord Hale*) the return "began to be changed; and was uniformly "*in præſens* "*parliamentum*."

in

in which that order iſſued, *Lord Bridgwater* (it ſeems) reported from the committee for *petitions* (thoſe of *appeal*, I take it for granted), that they ſhould be retained *in ſtatu quo*, until the next *ſeſſion* of parliament.

Eight other precedents relate entirely to an *original* judicature in the houſe of peers; and one of them, ſo late as the year 1671, is a complaint *by a wife againſt her huſband—who is no peer—for ill uſage*; when the further debate is adjourned to the firſt Tueſday of the next *ſeſſion*. *Five* of theſe *eight* are as far back as the time of *Edward I.* In one of them, the king of *Scotland* perceiving judgment likely to go againſt him, deſired reſpite till the next parliament.

All the remaining precedents are *two*, and they *alone* are precedents of *criminal accuſation*; but neither of them, *impeachments*, or any thing like them. They were both in the time of *Edward the Third:*—One, the caſe of an archbiſhop, who was arraigned at his own deſire, before the peers; upon which arraignment, certain peers were to hear his anſwer, and the effect of it was to be debated *in the next parliament.*

In the other, a culprit having been accuſed in the former parliament (but it is not ſtated, by whom,) of *extortion*—a commiſſion is given to one peer, and the chief juſtice, to examine the buſineſs, and they report—that by *eight inqueſts* he had been found guiltleſs.

All theſe precedents are introduced by a reference to a writer whoſe name is *Crompton*, for the form of a *ſcire facias returnable the next parliament*; ſo that evidently they are intended as precedents applicable to *writs of error*, and *appeals*, alone.

" But, in the anſwer of 1673, it is evident, " that by the words " *other buſineſſes*," the " lords' committees mean to determine, the " continuance of impeachments from ſeſſion to " ſeſſion, and that, in parity of reaſoning, they " muſt proceed after *a diſſolution*, in the *next* " *parliament*."

I beg leave to deny, and ſhall endeavour to refute, this " *parity of reaſoning*;" but if it ſhould even be juſt, what could be more ſurreptitious, and irregular, than the conduct of the lords' committees in 1678? (and which is, at leaſt, evidence in ſome degree, of *their* ſuſpicion that they had no ground for the report of their judgment, as built upon that of 1673.) They report *in one day* *—they never *produce* the order of 1673 (which they call a " *judgment*"), or *any one precedent* contained in it; and would yet impreſs upon the lords, by the nature of their general reference to it, that it was an *adjudication* of the *very point* at iſſue; namely, in other words, that it *adjudged* " writs of error, and appeals, to con- " tinue *in ſtatu quo*, after a *diſſolution*."

* The reference of 11th *March* 1678, points only at appeals, and is a *reference* to *opinion*: 17th *March*, a new reference is made as to the mere ſtate of the impeachments brought up in the laſt parliament, which is a reference to *fact*.

If

If the opinion which they communicate officiouſly as to the *Law* of *impeachments*, though it is not referred expreſsly, even by *them*, to that *Judgment* in 1673, muſt be taken to have been comprized within the effect of it*, ſurely it became them to lay the Judgment itſelf before the Houſe, in order to have that point a little better underſtood.

In truth, nothing is more certain, than, *firſt*, that by the *Judgment* in 1673 *a new Law* was made reſpecting writs of error, and appeals, after a *general prorogation*. Secondly, that after

* " Their Lordſhips, upon peruſal of the Judgment of " this Houſe of the 29th *March* 1673, are of opinion, That " in all caſes of appeal and writs of error they continue, " and are to be proceeded on in *ſtatu quo*, as they ſtood at " the diſſolution of the laſt Parliament, without beginning " *de novo*.—The Judgment and proceedings being large, " are omitted to be repeated, the Journal of this Houſe " being *ready* wherein that Judgment is entered.

" And upon conſideration had of the matter, concerning " the ſtate of the impeachments *brought up from the Houſe* " *of Commons the laſt Parliament*, and all the incidents " relating thereto, their Lordſhips find, that the five Lords " who are in the Tower, are upon general impeachment; " and the other Lord is impeached with ſpecial matter " aſſigned.

" And their Lordſhips are of opinion, That the diſſolution " of the laſt Parliament, doth not alter the ſtate of the *Im-* " *peachments brought up by the Commons in that Parliament.*"

a *diſ-*

a *diſſolution*, they were ſtill conſidered as determined, and abated, without an idea that, by this Judgment of 1673, the Lords had affected that queſtion.

For this I take the word of Lord *Hale* *, in two Manuſcript works evidently written before 1678 and after 1673. They are works of method, and ſyſtem, intended for poſterity, and written by the moſt enlightened ſcholar in his profeſſion. A more diſcriminating head in the arrangement, and application, of ſcience never bleſt the world.

He *could* have no bias in what he wrote, and it is written without reference to the analogy between Writs of Error, and Impeachments, which analogy had never ſtruck *him* as reſulting from the Judgment of 1673.

* In 1 Ventris, 31 Eaſter-Term 1669, it was held, That a Writ of Error returnable *the next Parliament*, was not good; and that no *ſuperſedeas* even *to a certain day*, if *remote*, could ever tie up the Courts below. It is curious, and very intereſting, to ſee the uniformity of this great man's opinion upon the ſubject before us. Anonym. 1 *Ventris*, 267. He ſays, in his *judicial* character—" It has been taken, that a " *prorogation determined* a cauſe in *Parliament*;"—but the Lords have *lately* determined otherwiſe. The date of this Report is 1674.

His propoſitions are in ſubſtance theſe:—"that " before 1673, writs of error, unleſs continued " by *ſpecial* prorogation of thoſe writs, *abated* at " common law, in the enſuing *ſeſſion*;" and he denies the legality of a *ſuperſedeas* upon a writ of error when there is no parliament, or of a *ſuperſedeas* directed by the lords, pending a writ of error "*till the next parliament*, becauſe (he " ſays) there is no certain *time* when parliament " ſhall be ſummoned, *poſſibly not in ſeven years*; " and the *ſuperſedeas*, if *indefinite*, would be an " intolerable delay to juſtice:—that he had " known it ſo determined by the lords in *his* " preſence, when *Bridgman* was keeper;" which muſt have been between 31 Aug. 1667, and the 17th of Nov. 1671:—that *lately* it had been reſolved by the lords, *upon the view of precedents*, (alluding evidently to the order 1673, when he was chief juſtice,) " to conſider the writ " of error, after a *general* prorogation, as in " force." Many of *thoſe* precedents he quotes himſelf, though for other purpoſes; and he adds others of a ſimilar import;—" that after a *diſſo-* " *lution* of parliament, writs of error, and appeals, " *completely abate* *; that no *remittitur* of the

* This was *law before* 1673, as well as *after* it. In *Dethic* and *Bradburn*—Sir *T. Raym.* p. 5. Hilary term 1660,—it was the very point adjudged.—As a general propoſiti[illegible] is taken for granted.

" record is neceſſary, but the ſuggeſtion is " enough in the court below;—that he has " known it often ſo ruled."

I rely more upon this *direct* aſſertion of ſo able, ſo correct, and ſo honeſt a judge, for the *law*, and the *fact* which *he* affirms, than upon all the numerous *reporters* to the ſame effect;—eſpecially as *they* are in general confuſed, and as the hiſtorical parts of them, upon this topic, are too often either inaccurate or miſunderſtood.

There is not ONE inſtance the other way.

What pretence, therefore, could exiſt in law, to act upon the writ of error and appeal, (at any one moment before * the order of 1678,) after a *diſſolution* of *parliament?*

But it may be ſaid—" how can *prorogation* " be diſtinguiſhed from *diſſolution*, in its effect " upon *writs* of *error*, and *appeals?*"

* The two long arguments which are given to the *Earl of Danby*, are ſo full of error *in fact*, that it is impoſſible he could have delivered, or publiſhed them, as we find them.

He ſays, for example, " that *Lord Hale* reſiſted the order " of 1678, upon the bench;" and even tells us what he ſaid in defiance of it; though *Lord Hale* had been dead more than two years, when the order was made. He died upon the 25th of December 1676.

The

The anſwer may be deſcribed as technical, but it has its root in the conſtitution. It is, that when the lords and commons are *diſſolved*, the court of judicature exerciſed by the lords, is terminated, and the revival of parliament forms a new court of the lords in parliament; nor can any one reaſon of *principle* be aſſigned for diſabling the lords to continue *their* proceedings on a bill, which does not apply to them in judicature. It is true, that as to the commons, *they* may be different men by the new return, but the lords are the ſame, except the ſixteen elected peers; and except as to new peers, who may at any time be called up to the houſe. It is no leſs true, that in *prorogations*, the ſuit may be equally retarded; but the delay of *prorogation* is never indefinite upon the face of it, as it *names a day* for the next meeting. Indeed, I take it, the indefinite period of this interval, between one *parliament* and the next, was a forcible ingredient in the policy of that law, which *abated* every thing judicial by a *diſſolution*. *Lord Hale*'s reaſoning is always forcible upon this topic, and he gives many illuſtrations of it*:—When the houſe of lords iſſue a writ

* It is ruled by *Lord Hale*, in his judgment 1673, *Coſten* and *Sedgewicke*—That if the writ is *teſted* at the laſt prorogation, returnable *at a day certain*, and a term does not intervene, it ſuperſedes execution; but *contra*, if a term intervenes.

of execution upon the original judgment, they do not make it returnable in the next parliament, but returnable in chancery, or in the court from which the appeal or the writ of error iſſued, *for prevention of delay*. It is now eſtabliſhed law (with a view to the ſame policy of preventing delay), that if, between the *teſte* and the return of a writ of error, a term intervenes, execution proceeds.

In ſhort, this guard againſt the delay, is one great feature, (and ſurely it is a liberal one,) that protects even a party in a civil action, who, by the judgment of an inferior court, has obtained a right.

But another analogy has been aſſumed, which is between *errors*, or *appeals*, and *impeachments*; and here more is meant than meets the ear in the words of the judgment 1673: For we are *now* told—"*That judgment* was formed in part, upon "a variety of precedents reſpecting criminal "accuſations in parliament againſt culprits of "ſtate. The anſwer, therefore, is a little wider "than the queſtion; and adds, "*other buſineſs* "*in judicature*," which takes in impeachment "as another judicial proceeding. The main dif- "ference being this—That in judicature, the "lords are the ſame court, but in legiſlature, "the commons may be different; a diſtinction

"taken

" taken by *Lord Hale* himſelf. It is true, that " *ſpecial orders* do appear to have continued " ſome of thoſe proceedings, but that was only " for precaution; and if the power to continue " an impeachment be once admitted, the want " of *ſpecial order* will not weaken the right of " demanding its continuance."

Upon my word, Sir, the refinement of theſe analogies, out-refines all the " quibbles of the " law;"—but a few words of plain ſenſe will mark the difference. In *writs* of *error*, the mere law is upon the record; and there is *no evidence* begun, which is to be continued. In *appeals*, there is, or may be, matter of evidence; but there, from the very nature of the appellant court, *vivâ voce* evidence could never in that ſhape have been delivered to them.—But upon impeachment, the lords *have* taken evidence *vivâ voce*; and can it be ſaid—that proceedings upon that evidence, well, or ill recorded, or not recorded at all, but in their memories, after an interval of ten years, can be at all reſembled to any part of their appellant juriſdiction, except in the general inconvenience of delay; and which, I apprehend, was a main ingredient of the common law, that abated an appeal even after prorogation.

But another anſwer is, which has in part been anticipated—*The accuſer is no more.*—Every one of thoſe who impeached *may* be out of the next parliament; and in that view the analogy from legiſlative proceedings appears to me irreſiſtible. A *judgment* upon *evidence* is to be exerciſed by thoſe who may be abſolutely new to it; and cannot, therefore, give their predeceſſors credit, for *their* floating memories of any one fact, or impreſſion, even if thoſe memories could be reached.

LETTER THE SIXTH.

Horum *ſimplicitas miſerabilis*; his *furor* ipſe
Dat veniam;—ſed pejores, qui talia verbis
Herculis invadunt, et de virtute loquuntur,
Sed quando uberior *vitiorum* copia? quando
Major avaritiæ patuit ſinus?

JUVENAL.

SIR,

IF ſtreſs can for a moment be laid upon the "*ſalutary conſequences* of the *order*, in what "befel the *Earl of Danby* himſelf," who, as it has been argued, was the main object of this public ſpirit, in the commons,—let us examine the *facts* upon record; *firſt*, as if no attempt had been made by his perſecutors to implicate him with any part of the infernal clamour againſt the popiſh plot;—and *then*, with a view to their uſe of that plot, as criminating *him*.

I can venture to aſſert, upon a deliberate view of the ſubject, that almoſt every meaſure adopted againſt him by the commons in parliament, before

before and after the reſolution of 1678 (levelled alſo at *him*, as well as the catholic peers), was an outrage even upon the *forms* and the *decencies* of juſtice; in a houſe of commons too, as thoroughly *packed* by the *Duke of Monmouth*, as the firſt parliament of 1685 could have been by king *James*.

For example—they accuſe him of *treaſon*, as reſulting from a charge, which, if true, does not conſtitute that offence. This, indeed, had precedent for, it in the perſecution of a better man *(Lord Clarendon)*; but that precedent was iniquitous.

In one of the conferences, to juſtify a *bill of attainder* againſt him, if he ſhould not appear upon a given day, *Winnington* has theſe words: "This is no flight of *innocent Moſes* from the "Egyptians, but of *guilty Cain*." * *Sacheverel* ſays, "It is but a bill of ſummons, to keep him "from *perfecting* his *treaſons* abroad."

* By the way, this eminent *patriot*, between Dec. 1678 and Dec. 1679, received for his good ſervices to *Louis XIV.* juſt 300 guineas; and a part of that ſervice expreſsly (which, it ſeems, *Montagu* was to manage) was, "to *ruin Lord Dan-* "*by*." In the liſt which *Barillon* ſends to his king, having mentioned *Harbord*, he adds, "Qui a beaucoup contribué à "*la ruine du Comte de Danbi*, 500 *guinces*." *Dalrymple's Appendix*.

They

They prejudge the juſtice of the Court (before which they accuſe him), upon the legality of his defence; affirming to that Court (by way of "*privilege*," I ſuppoſe, yet in round, and *judicial* terms) that his plea "*cannot be received*."

But nothing, in the whole tenor of their perſecution, is more an inſult upon the feelings of men, than what happened as to his plea of the pardon, compared *(ad homines)* to *their own* conduct in vindicating the impeachment;— "We can take every article of it for granted "(ſay the Lords), but it amounts to no *treaſon*."

"*Hear* us, however, to that point (ſay the "Commons) before you determine it."

Yet when the pardon is pleaded (as to which they had been themſelves cautious enough to examine precedents, and could only diſcover, that *in fact* the King had never made this *uſe* of his *right)*, they are in a rage againſt the Lords, for appointing an early day upon which that plea ſhould be heard; they *demand* an *immediate Judgment* upon it, which is dictated by *them*; and threaten with all their fulminated vengeance, the *advocate* or *friend* of the Earl, that ſhall dare to ſupport his plea at the bar of the Court, who are his only Judges, and who have ordered that he *ſhall* be heard.

When the Earl complains of this to the Lords, they aſk the Commons if ſuch a vote had paſſed;—and receive *no anſwer!*

The diſunion of the two Houſes upon other topics, and their union upon this legal continuance of the impeachment after a diſſolution, have been ſtated with an air of triumph in the debate; as if, in the firſt place, it were a *fact* clear of any doubt; and as if, in the next, it proved the force of truth, which could ſo unite theſe competitors, when ſuch an eſſential point of the Conſtitution was at ſtake. But there is no ſuch *fact*, and there could be no ſuch *inference* from it.

The Lords begun with ſpirit, but they were intimidated in the end by the popular flame, and their conceſſions, *before* they *legiſlated* this *Order*, as well as *after* it, were evidently obtained by dureſs upon their will. Of their puſillanimity, the Journals have recorded ſeveral glaring proofs.

For example, they attempt a compromiſe, when the Commons are goading them to the impeachment, and refuſing to let them *hear* the defence in bar:—They *recommend* his baniſhment, and ſend them a bill for that purpoſe, to which the Commons reply in a Bill of attainder,

attainder, if he ſhould not appear upon a given day:—The Lords are terrified;—they paſs the Bill;—and it obtains the Royal aſſent.

In one of their conferences, 12th April 1679, they meanly congratulate the Commons upon the point they had carried in this very doctrine of continuing the Impeachment, as if *they* had helped them to it; which unqueſtionably was true. The Commons anſwer with more ſpirit, than veracity (but ſpirit is often better—in politics), "That it was a *Right* for which they did "not thank them, founded upon *the courſe and* "*uſage of* Parliament!"—*ſplendidè mendaces.*

In this conference *Lord Shafteſbury* (the wickedeſt, and the ableſt of incendiaries) takes an active part;—he contradicts *the Lord Privy Seal*;—takes the popular ſide (with his tool the *Duke of Monmouth* * at his elbow) in favor of the Commons, but with ſome degree of management, as he was then tampering at Court, where he and his party, then moſt inveterate enemies to the *Earl of Danby*, upon the 21ſt of that very month, were admitted with open arms into the King's new Council.—What hopes for the *Earl of Danby* then?—But indeed what juſ-

* They often remind one of the *Cardinal de Retz*, and the *Duc de Beaufort*.

tice was ever done to him for an impriſonment five years in the Tower, without proſecution, by thoſe who turned a deaf ear to his demand of it, and puniſhed him in part without hearing him, by the impriſonment itſelf.

But is it unfair to mark, with how much diſingenuity they delivered him up to the rage of the times, (little ſhort of a national delirium,) againſt the *Popiſh deſign*, that political fable (of *Lord Shafteſbury*'s contrivance, as it is generally believed), which began, continued, and ended in a ſyſtem of the moſt complicated perjury that forms of juſtice ever ſanctified, and of murder the moſt atrocious that ever had the maſk of judicial ſolemnities?

But let us take the impeachment itſelf, and read the fourth article of it, which imputes to him—"That he is *Popiſhly affected*, and hath "*traiterouſly concealed* the late *horrid plot*;— "that he hath ſuppreſſed the King's evidence, "and hath diſcountenanced the witneſſes."

In the very firſt reaſon againſt even *hearing* him upon his pardon, the Commons tell the Lords—"That *his* uſe of it, and the long pro- "teſtation by which he introduces it, are an "aſperſion upon the King, as if his Majeſty "had commanded or countenanced his crimes, "*particularly*

" *particularly* that of ſuppreſſing and of diſ-
" couraging the diſcovery of this plot."

If it be ſaid, (and it *may* in part be ſaid with truth,) that all this was thrown in as an " auxi-
" liary, but the *main* offence was the ſale of
" his maſter's honor, and regal truſt, proved
" againſt him by his own Letters;" what a foul character does it give to this proſecution, that it ſhould have been ſo tainted by thoſe invidious topics, and prejudices, for the purpoſe of heightening the popular odium to which he was then devoted!

In truth, all the *other* articles (except that reſpecting the ſale of the Peace) are ſo looſe, and flimſy, that not only the Lords did right in refuſing to commit him *, upon charges, which, if true, were no treaſon; but as to theſe *other* articles, might have refuſed to act upon them, as having no ſolid ground of any kind, even for the charge of miſdemeanours.

It is curious to obſerve, that in *Mr. Poule*'s † accuſing ſpeech to the Commons, he charges him

* Yet the ſame Lords paſſed a Bill of attainder, to make him appear, though at firſt they would not commit him.

† This gentleman has the honor to be much diſtinguiſhed in the correſpondence between *Barillon* and *Louis XIV*, as being high in the liſt of thoſe who, through the Embaſſador, were in a ſecret

him with ſeven crimes; but this "*concealment* of "the *Popiſh* deſign" is not one of them. Nor ſhould it be omitted, that upon reading two Letters of this Earl, revealed by *Montagu* (who acted in part* from pique to him for his preference of *Sir Wm. Temple* †), and Letters which convicted him of tampering with French money (payable

a ſecret conſpiracy with France at this very period; and "*the* "*ruin of Danby*," one expreſs arrangement. For his activity, and addreſs in that work, he received, between the 22d of *Dec.* 1678, and the 24th of *Dec.* 1679, 500 guineas.—*Dalrymple.*——*Plato*, in his Republic, has puniſhed thoſe with death who took preſents, though to *execute a duty*.—There was no ſuch law for the *Whigs*, and *Patriots* of 1678.

* It appears, upon unqueſtioned proofs, that *Montagu* was bribed by *Louis XIV*, for this proſecution, and received money to corrupt the Houſe of Commons, or the leaders of it, in order to animate *their* ſupport of it: *Barillon* ſtates the whole deſign, in a Letter of *Oct.* 24th, 1678.—"If he "(*Montagu*) ruins *Danby*, in ſix months, he is to have either "100,000 crowns in hand, or 40,000 crowns annually, "upon the *Hôtel de Ville*, or a penſion of 50,000 crowns for his "life."—"The deed is done," ſaid *Montagu*, in a Letter to the King's miniſter at *Verſailles*, dated *Oct.* 26th, 1679.—"*Pay me* for it!"—No ticket-porter could have made a more cool demand for the delivery of a hare. "It has been done "eight months ago, and has coſt me 60,000 crowns."—I give the ſubſtance of his Letter.

† This *Abdiel* amongſt the evil ſpirits of 1678, having been told, that "*ſeeming* to believe this plot, would be *uſeful*, "found it was a ſcene in which *he* could not be an actor."

however

however to the king, and one of them having at the bottom of it, " this by *my order*, C. R.") for the Peace of *Nimeguen*, the Houſe at once determine to impeach him upon that evidence *alone*. This, upon the 19th of *December* 1678; yet upon the 21ſt of that ſame *December*, in the very articles themſelves, drawn up with *Montagu*'s help, we find the *Popiſh plot*, and his concealment of it, made a diſtinct offence of *high treaſon* againſt him;—not a ſhadow of apparent evidence, or explanation, having preceded this article.

The Earl dwells the moſt upon this part of the impeachment, with his accuſtomed addreſs, (for he certainly was a man of talents, though neither an able, nor a faithful miniſter,) in the Houſe of Peers; becauſe he knew it was the moſt calculated for prejudice againſt him, and felt his ground ſtrong under him.

He mentions a very curious anecdote, which is, that his own ſon, then in the other Houſe, voted for this 4th article, in order to mark the kind of zeal which animated the Commons againſt him. In fact, it was he, the *Earl of Danby*, who had juſt laid *Oates*'s narrative before the Houſe, againſt the King's expreſs command: and Sir *William Temple* ſays—that he

had fallen into the King's diſpleaſure upon that very account *.

In the very next Parliament, upon a rule taken from *another* Court of ſummary juriſdiction,—*Caſtigatque, auditque dolos*,—*Titus Oates*, the moſt infamous of men, is received, and openly encouraged as an informer againſt him, " for diſcouraging the diſcovery of the " Popiſh plot." This inflames the popular clamour.

We mark again their fineſſe in faſtening this Popiſh deſign upon *him*, when in one of the conferences, upon the favorite point of reſiſting the pardon, they expreſs a fear that a ſimilar pardon will be obtained for the *Popiſh Lords*.

In 1681, *Fitzharris*, upon his trial, having accuſed the Earl of being privy to *Godfrey*'s

* The King did not believe one ſyllable of this deſign; and yet in the end encouraged an open proſecution of it, as tending to refute the imputation of his favor to Popery.—*Temple*.

Upon the 17th of *Nov.* 1678, the *Duke of York* tells *Barillon*, that he, the Earl, adopted the ſentiments of Parliament *againſt* popery, *to make himſelf popular*: yet he ſo contrived as to be hated by the Commons; and when *Barillon* afterwards, *Feb.* 16th, 1679, gives *Lord Sunderland* a warning againſt theſe *popular flights*, the anſwer which that intriguing Peer gave to him is very ſignificant—" *Vous voyez comment le* " *Comte de Danbi, s'en eſt bien trouvé*."

murder

murder * (a thing of *ſtage-effect* †, in *Lord Shaftesbury*'s hands);—and though his evidence, (which he confeſſed, a little before his death, to have been perjury ſuborned,) beſides many external ſuſpicions, was groſs in itſelf, a bill of indictment was found againſt the earl for that murder, upon the very day that he was to appear in the king's-bench, for the purpoſe of demanding bail upon his impeachment.

According to *Rapin*, the main view of this proſecution againſt the *Earl of Danby*, was to make him give up the king, and the *Duke* of *York*, whom it was their perſevering deſign to accuſe, and convict in form, as accomplices in *the Popiſh plot*; an offence which had been previouſly not *inferred* againſt them (by men of common ſenſe) but *repreſented* as *inferred*, from the obſtinate attachment of the duke to that mercileſs religion, and the king's pecuniary dependence upon *Louis XIV.* He adds, that a belief in the catholic plot was confirmed by theſe letters, which proved the king a corrupt agent of the court of *Verſailles*; and that a fear of *Lord Danby*'s "diſcoveries," was given out as the ſole motive to the pardon.

* *Dalrymple* has a curious extract from the MSS. of *Lord Keeper North*, reſpecting this murder:—"A popular fiction "was buſily circulated, that *Godfrey* had been ſeen laſt at "*Arundel Houſe*; or, as others whiſpered, at the *cockpit*; "in order that the *Duke of Norfolk* and *Lord Danby* might" (in his emphatical words) "*toſs the fire from one to the other.*"

Bedloe, who was twin-brother of *Oates* in perjuries,—"had "ſeen the body at *Somerſet Houſe*," one of the palaces in which the *Queen* reſided.

† The body was, in truth, expoſed, as *Antony* expoſed that of *Cæſar*, to the populace.

Indeed, the commons embark the miniſter and the king in the ſame peril; and upon the 22d March, when his majeſty had appropriated the guilt of theſe letters to himſelf, declaring, "that he would pardon him (the *Earl of Danby*) "ten times over, if it ſhould be required;" they put a very unexampled, but a very juſt, affront upon him, by taking not the leaſt notice of it *, and proceeding directly to their demand of judgment.

Burnet †, who gives the faireſt, and the moſt rational, account of theſe crooked politics, that is to be found in the hiſtorian's page, truly diſtinguiſhes between the real import of *Danby*'s letters, and that wild ſuppoſition of the "*Popiſh* "*plot*," as lurking at the bottom of them;—a bottom "*deeper than e'er plummet ſounded*,"—if the *Popiſh deſign* could be found in it.—He repreſents them to have been letters that ſhould have ſtimulated the commons, the peers and the public ſpirit of all parties in the kingdom, united as one man, into new laws againſt popery; inſtead of driving them into wicked, and prepoſterous accuſations of innocent men.

Coleman's letters formed a direct evidence of the general deſign to favor popery:—*They* were,

* Unexampled inſult on the part of the king, in the tone of defiance which accompanied this protection, juſtified *any* reſentment of the commons againſt him, which their legal powers could enable them to enforce.

† If any man after *Burnet*'s account of *Oates* can believe one ſyllable that he ſaid or ſwore, he muſt believe that *Burnet* himſelf is the work of men:—there is no other alternative.

by

by a forced conſtruction, received as proofs of a ſyſtem in which the *Earl of Danby* took a part; and *his* letters gave more alarm when compared by falſe analogies to thoſe of *Coleman:* But this iniquity had a further extent. The correſpondence of both, viewed as parts of a deliberate plan, was, by a more cruel outrage, tortured into evidence of the "*helliſh plot,*" (as it was called,) not only againſt themſelves, but againſt every catholic, whom the intrigue of the leaders in oppoſition would ſelect. The perjured *Oates* was always at hand, and in the ready fiction of his brain, would accuſe any catholic at a minute's warning, of an intention *to murder the king*, &c. which intention had been long known to him, the accuſer, though hitherto withheld from the public ear. Indeed, it was enough to *accuſe* in the lump, credulity often ſparing his prolific invention the taſk of a detailed *, and circumſtantial falſehood.

Accuſator erat, qui verbum dixerat, "*hic eſt!*"

The fallacy, or deluſion of the parties, in this cruel, and ſanguinary fiction, was to confound the teſtimonies which appeared in proof againſt the king, and the catholics, (who were in colluſion, though upon different views, for the eſtabliſhment of popery,) with another deſign of the moſt atrocious nature that human depravity could either admit, or invent. It was in proof

* *Oates*'s diſcoveries conſiſted of ſo *many particulars*, that, upon that very account, though two thirds of them were falſified, it was thought "*above invention*" to have invented the *whole.*—*Burnet.*

upon the view of *Danby*'s letters, that *Charles the ſecond* was enſlaved, in general, by his corrupt avarice, to a *catholic* prince, and a *bigoted* catholic, who hated proteſtants, and proteſtants of this kingdom the moſt.—It was in proof, upon the view of *Coleman*'s* letters, that a general deſign had been ſet on foot by the catholics, to favor their own religion—to eſtabliſh it if they could.

Oates, in his written paper, delivered, after the revolution, to the houſe of peers, repreſents "the *Earl of Danby*'s letters;" to have confirmed the general credit of *his* evidence.

I forbear to ſay any thing further of the popiſh plot, either taken by itſelf as a mark upon the times in which the order of 1678 was iſſued, or as being cloſely referable, through the catholic peers, to the view, and motives of that order; nor will I touch, in this place, upon the inhuman uſe that was made of it in the caſe of *Lord Stafford*, "whoſe *noble blood*, having been ſhed "in ſupport of it, has given a force to that "precedent, which no later authorities could "have ſhaken."

This *trope of eloquence* (but which I heard from a very able man) admitting really no ſerious anſwer, and in one's cloſet rather tempting

* This unfortunate man, who was executed, *of courſe*, denied in his lateſt breath every tittle of the evidence, by which he ſuffered.—*Oates*, and *Bedloe*, had been the witneſſes againſt him; as they alſo were againſt many others, who were executed after appealing to heaven in a manner equally ſolemn, againſt theſe perjuries.

one's

one's ridicule, is put here as one proof, " *that* " *all which gliſtens* (in that aſſembly) *is not* " *gold.*"

By the ſide of it I would place the congenial eloquence, and *reaſoning*, of equal abilities, which aſſiſted in " ſhedding that *noble blood*," as a ſacrifice to the order of 1678:—" Under favor, " what is once upon record in parliament, may " at any time afterwards be proceeded upon: It " is a ſudden objection, but I conceive it hath " been often done.

" However, in a caſe of this nature, when " the *life of the king*—when *our own lives*—and " *our nation*—and *our religion*, lies at ſtake, " I *hope you would make a precedent* *."

But after all, are ſuch times, and ſuch proceedings, and ſuch modes of argument, as theſe, no ſtain upon the order itſelf?—Are they unconnected with it?—Are they only *abuſes* of a *legal* power?—Or is the whole ſyſtem, an abuſe, including this pretended judgment as a part of it?—Has it not been proved an aſſumption of *illegal* power?—And was it not the view of that aſſumption, to uſe political intrigue in the moſt odious form it ever had worn—that of a ſanguinary perſecution, fed, and cheriſhed by a popular clamour †?

* *Serjeant Maynard*, as one of the managers;—a revered, and a very honourable name! but his accuſtomed *ability*, as well as *temper*, deſerted him on this trial.

† Upon ſeveral of the convictions a ſhout of joy rung through the court.

If

If it be ſaid, as I have heard, that, in 1685, the *times* were equally infamous, and more cruel, —ſuffer me to controvert that ſuppoſition.

The *Campaign*, as it has been called, is an execrable part of *James the ſecond*'s inglorious, and wicked, reign; but it is more to the *perſonal* odium of *Jeffreys*, and the king, than a reproach upon the general ſpirit of the times. What are the ſavage, and brutal incidents of the weſtern commiſſion, to the murder of *innocent* catholics, prejudged by the parliament, and the people out of doors *, in a delirium of cruelty;—the infernal *Scroggs* † at their head, who, in his judicial ſeat, bullied the witneſſes—repreſented the guilt, as requiring no proof—aſſerted that catholics, who were upon the ſide of catholics, had not the ſame credit with proteſtants, who were againſt them—and gave them, when convicted, joy "of the *maſſes* that were *to be ſung* "for them!"

Severity againſt the *rebels* was juſt. The cauſe had no iniquity; though in multiplying,

* "Thoſe who are ſubjected by *multitudes* to wrong, are "deprived of all conſolation:—they ſeem deſerted by man-"kind, and overpowered by a conſpiracy of their whole ſpe-"cies."—*Mr. Burke's Reflections on the Revolution in France.*

But what are multitudes alone, to multitudes trained in cold miſchief, by political incendiaries,—armed with *ariſtocratical*, and *judicial* powers—familiar to the *uſe* of *perjuries*, and impreſſed with an idea that even to *ſhed innocent* (if it was *catholic*) *blood*, was only to repay in kind, that general intention of the catholics, to murder every good proteſtant, which, though never proved, it was not *ſafe* to diſpute?

† *Wicked*, *ignorant*, and *poor*, are the epithets, by which *Burnet* has compreſſed his character.

or

or in ſelecting executions, and in the mode of convicting priſoners, extreme injuſtice, and cruelty were diſplayed.

" But in the popular ferments of 1678 and " 1679 originate our liberties:—and was it not " this period that gave to us the *habeas corpus* " *act?*"

I agree, that a nobler ſecurity for perſonal freedom cannot be found, than in the acquiſition of that law to the efficacy, and ſpirit of the writ, which had been ſo often eluded. Nor am I cold in admiring the *bill of excluſion*, which paſſed the lower houſe in 1769; nor do I at all deny that *uſurpers make very good laws.*—*Richard* for example, and *Cromwell.* But in a compariſon between the times we are now comparing, what praiſe can be given, or I ſhould rather ſay, what praiſe can be refuſed by this happieſt of all periods for liberty, the age of 1791, to the biſhops (an order of men ſo often calumniated), for the patriotic ſtand made by *them* againſt the *diſpenſing power* *; which they, and the public ſpirit of the kingdom, cruſhed under their feet? Upon the rock of that reſiſtance was built the *revolution.* It was one of thoſe

* In the *ſecond Lord Clarendon's diary*, we have a curious trait of *Jeffreys*;—and characteriſtic of all ſuch brutal tyrants, who, in the hour of peril, and in the act of duplicity, or of time-ſerving revolt, often give themſelves an air of public ſpirit, which they keep in countenance by the ſame unpoliſhed manners that accompanied their better fortune.—When he ſaw that *King James* was ruined, he called *Wright*, the chief juſtice, " a *beaſt*;"—the other judges, " *knaves* and " *fools.*—*He* was averſe to this trial—*he* was an *honeſt man*—" the judges were, moſt of them, *rogues.*"—*cui ſufficeret ſævus ille vultus, ac rubor, quo ſe contra pudorem muniebat.*

exalted

exalted precedents, in which (as in the caſe of *general warrants*), practice, with a colour of *uſage* reſulting from its age, and uniformity,—but againſt the eſſential *principles* of *law*, was reſiſted by the energies of the conſtitution—by the common ſenſe, and feelings of men.

As to Mr. *Juſtice Blackſtone*'s panegyric upon 1678 and 1679, the uſe made of it in our debate, convinces me, that *Whigs* are more generous, now, than I have known them, in that aſſembly, heretofore; and will accept of *any* help which their adverſaries in political theory may offer to them. But if "*Blackſtone*'s *Commentaries*," in a political view of them, (take for example his account of the Revolution) conſtitute part of that library which your friends the ariſtocracy of the *Whigs* are to conſult, I would ſay, as *Tully* ſaid to *Pompey*—"*Optimatibus tuis nihil confido.*" The time *was*, that in a debate upon ſuch great queſtions as theſe, a writer ſo *prejudiced* upon conſtitutional topics (to ſay no worſe of it) would not have met with any quarter from the perſon who quoted him as an auxiliary to his argument.

But it is not the opinion of an elementary, though ingenious, and uſeful writer upon law that can overcome the obvious inference from hiſtorical fact, and record; even if the paſſage warranted the purpoſe, for which it was quoted.

Mr. *Juſtice Blackſtone* gives to the period of 1679, the character of an age *preſenting* as good a *theoretical conſtitution*, as we ever enjoyed; formed, however, of the good old materials, which

in general the madneſs of the times had ſpared; for except the *habeas corpus act*, I am not aware of a ſingle buttreſs added by *them* to the *tenement* left them by their anceſtors*.

Having ſaid this of *theoretical perfection*, he admits an infinite number of *practical* oppreſſions in the period that followed 1679: He calls indeed the whole reign, *ſanguinary*, *turbulent*, and *wicked*:—nor of his *theoretical perfection*, as it ſtood in 1679, does he repreſent the order of 1678 as a part.

As to his *theoretical perfection*, accompliſhed in 1679, I cannot agree with him;—and I appeal, Sir, to *you*, whether an abſolute right of laying aſide parliaments was not a *theoretical imperfection* with a vengeance. It was *practical oppreſſion* too; for the laſt *three* years of that reign. I would alſo beg to aſk of you, if the want of a ſufficient guard againſt the incurſions of a *diſpenſing power*, habitually exerciſed from the earlieſt ages of the government, was not another *imperfection*.

As to his *practical oppreſſion*, the *whole* proceeding againſt the *Earl of Danby*, at whom the order of 1678 was levelled, and the *order itſelf*, conſtituted glaring parts of it.

* I am aware, however, of a merit which they certainly had, in removing ſome of the old appendages to the *caſtle*; which had been kept up for ſtate, and were become dangerous to the tenement. [See the act for the abolition of military tenures, of purveyance, and pre-emption.]

But after all, there is extreme fallacy in the argument, that credit is due to a particular meaſure, which is queſtionable in itſelf, to ſay no worſe of it, in times of the moſt violent *faction*, to ſay no worſe of *them*, becauſe in thoſe times a good law was made.

The writer of *Hiſtoric Doubts* upon the fabulous, and theatrical, monſter that has been made of *Richard the third*, had better arguments for the check which his ingenuity gave to this exaggerated picture, than ariſe from the good laws which that uſurper made.

But, on the other hand, if a law is made, which is *declaratory* upon the face of it, and the legiſlators are the only witneſſes in its favor, let it be ſuppoſed, that I diſcover *them* to be corrupt, and ſanguinary perſecutors of the individual, at whom that law is pointed. *Can* I put faith in it * ?—If in the *motive*, and *uſe* of the meaſure, I diſcover nothing but ſelfiſh oppreſſion, I ſuſpect the *meaſure* itſelf—if I perceive trick in the *mode* of bringing it forward, and precipitation in the *time* given to colourable enquiries; but above all, if I diſcover an abſolute *falſehood* in the recital, and can prove, that in the ſingle ground *alleged* for it, there is not a colour of analogy;

* " Inter arma *ſilent* leges,"—applies itſelf to a civil war, in the field: but the political diſcord, which is upon the verge of a civil war, is guiltier ſtill. Amongſt *thoſe* arms, the law is not " ſilent"—but, which is a heavier calamity—*bought* and *ſold*.

—more

—more ſtill if I ſee it refuted by irreſiſtible analogies, and principles of Law, I turn from it with ſcorn, and refuſe my allegiance to it.

I have here ſuppoſed the Order of 1678, made in truth by the Houſe of Commons, that is, by their influence upon the Houſe of Peers; a concluſion which I would reſiſt, if I could. But "*Socrates*," and "*Plato*," the Commoner, and Peer of that age, muſt forgive me, if "*Truth*" outweighs both of them in my eſteem.

Indeed, as to the *Peers*, it ſeems a meaſuring caſt between the option, which I may, in candor, indulge to them, of this *paſſive obedience* to the Commons, in framing the *Judgment*,— or of its *original* ſin; as it ſtands upon ground, which is moſt inſidiouſly alleged, and which they muſt have known to be falſe.

I have the honor to be,

SIR,

With great reſpect, &c.

LETTER THE SEVENTH.

—— ſublato jure nocendi.

HORACE.

SIR,

"THE influence of this Order and Judg-
" ment upon Courts of Law," has been adduced as a powerful argument for the *legal* authority of it, or, at leaſt, before the Order of 1785 had iſſued. In particular, the *Earl* of *Danby*'s long impriſonment has been quoted as proof, that it was an Order built upon ſound principles of *Law*, or that it was made impregnable againſt every law, but that of Parliament, by ramparts of the Conſtitution; as it met with ſuch reſpect from the Judges in *Weſtminſter-hall* upon that Earl's repeated applications to them for *bail*.

Above all, and with more plauſibility, the Report, in *Carthew*, of *Lord Saliſbury*'s fruitleſs petition for diſcharge, or bail, to the Court of *King's Bench*, after the Parliament, in which he had been

been impeached, was at an end—*after the Order of* 1685 had iſſued—and *after the Revolution*, has been preſſed as a deciſive teſtimony in favor of the doctrine, " That impeachment is never " terminated by the diſſolution, or the natural, " and regular end of the Parliament, in which " it was begun."

This Letter will contain my anſwer to ſuch parts of the objection as confine themſelves to the period between 1678 and 1685: the *next* will take up, and cloſe, the diſcuſſion of *Carthew*'s report.

Before I addreſs myſelf to the *application for bail* in this earlier period, I beg leave to remind you of a memorable *fact*, and *precedent*, which intervened between the date of the Order in 1678, and the *Earl of Danby*'s firſt application to the Court of King's Bench for bail; though after *Lord Stafford*'s vain petition for it in the ſame Court—after his trial—and after his execution.

This *fact*, and *precedent*, will evince, that Courts of Law held the Order of 1678, as having no legal weight, or credit; and, at leaſt, as forming no general authority, which could bind the regular juſtice of the kingdom.

I al-

I allude, Sir, to *Fitzharris*'s trial in the Court of King's Bench, upon the 27th of April 1681; —to the arguments upon the diſcuſſion of his *plea*;—to the point which *he* aſſumed, and the *Attorney-General* admitted;—each, in a different mode, completely diſcrediting the Order of 1678.

It is well known, that he was impeached by the Commons, in order to be ſaved from an indictment, and reſerved ultimately as another *Titus Oates*, with a view to the further attack that was in train againſt the *Duke of York*;—that his impeachment was rejected by the Lords;—that complaint was made by the Commons againſt that meaſure, as "an obſtruction "to the juſtice of the kingdom;"—that all were menaced, who ſhould proceed againſt him at law; —that he was indicted, however, after the diſſolution of that Parliament;—that he was arraigned upon this indictment, in the Court of King's Bench, and pleaded in vain a "*depend*-"*ing impeachment*;"—that he was convicted, and executed.

Burnet ſays, that his plea failed him, becauſe his impeachment had been rejected by the Lords. But the hiſtorian is deceived; and it was, in fact, refuſed upon the ſingle ground, that his allegation of the depending impeachment,

upon

upon which he relied, in bar to the indictment, was *formally* incomplete; the Judges *gravely* inſiſting, that as to the *fact itſelf*, or, in other words, the *ſubſtance* of *this plea*, they had nothing to do with it.—A paradox, grounded upon the moſt abject fear!

But upon the *validity* of this plea, either in form, or ſubſtance, I ſhall hazard no opinion; and have recourſe to it for a very different purpoſe; that purpoſe will ſoon unfold itſelf, and, if I am not much deceived, will ſtrike the reader as an object of his peculiar attention.

It is, amongſt other topics, thus argued by *Williams*, the leading counſel for the culprit.

" It appears plainly upon the record, that " this Impeachment *was* depending *before*, and " it *does not* appear but that now *the Parlia-* " *ment is in being*.——I take the ſubſtance of " our plea to be this:—Here is a perſon im- " peached in Parliament, by the Commons, for " High Treaſon, before the Lords; and, for " aught that appears upon the record, *that* " Parliament *is in being ſtill*."

The *Attorney General* makes this anſwer:—

" They object, we have admitted here, that " there is an impeachment;—that we have ad-

" mitted

" mitted it an impeachment for the ſame mat-
" ter ;—*and that we have admitted the Parlia-*
" *ment in being.*

" Indeed, if we have admitted *the Parliament*
" *in being*, it would go hard with us ; *and, if*
" *not ſo admitted, Mr. Williams*'s argument falls
" to the ground.——But no fact is admitted,
" which is not well pleaded, &c."

He then makes the point,—" that a diſſolu-
" tion of Parliament requires no proof; and
" that every Court of Law takes notice of it,
" without averment, as of a notorious fact."

The whole ſcope of his argument conveys the idea, that " if an impeachment ever exiſted " for the ſame offence againſt the culprit," (a fact which *he* thinks ill-pleaded) " *it is no* " *longer depending*, after a diſſolution of the " Parliament."

Jeffreys, who follows him, has theſe remark-able words :—" Whether the impeachment did " not fall by the diſſolution ;—*it is not ad-* " *mitted that it did not*, but it is waved, as not " being pertinent."

Another very important circumſtance occurs upon this trial—important in itſelf—important *ad hominem*, with a reference to the actor in it—

a mark of the infamy due to the whole tranſaction—a decided proof, that when the object was attained, in my *Lord Stafford*'s death, and the *Earl of Danby*'s ruin, this order of 1678 was conſidered as a judgment *functum officio*, and laid upon the ſhelf.

The ſecond counſel for *Mr. Fitzharris* muſt not be overlooked—*Sir Francis Winnington*. He was the moſt furious partiſan for the commons, againſt the *Earl of Danby*, and the Popiſh lords. He attended moſt of the conferences upon *Danby*'s impeachment, and was the boldeſt incendiary of his time. Having been ſolicitor-general during a part of this ferment, he was removed from his office, and fell into the *Duke of Monmouth*'s corps. In that ſituation, he was a manager of *Lord Stafford*'s impeachment, and exerted peculiar activity in the oppreſſion of this inſulted, as well as injured peer; who could not even be *heard* againſt the order of 1678, though in truth it was a judgment of death upon *him*, and a part of the judicial proceedings againſt him, behind his back;—though it never had been acted upon, ſo as to put any culprit upon his trial, but himſelf;—though it had not been upon the journals two years;—and though, if he could have been *heard* upon it by his counſel, not one of his grey hairs could have been touched.

The managers, as if to goad him by the ridicule of their conduct (and moſt of them, to their ſhame, were lawyers), either affirmed what they knew to be falſe concerning it, or diſſembled an ignorance of it, and ſurpriſe at the objection; or with-held it as an *arcanum imperii*, never to be developed by vulgar eyes; or made no ſcruple to aver the neceſſity of a *new precedent*, commencing at the execution of this culprit. *Winnington*, however, who knew the order well, affirms that, "it was *deliberately* made, upon a "ſearch of *all* precedents in *all* ages."—The moſt atrocious falſehood that a court of juſtice ever heard, but which *this* court heard without reproof, though every judge preſent muſt have known its falſehood, in one part of it; and every judge who had been a *lord committee*, muſt have known, that nothing was more falſe than the reſt.

Yet this identical *Sir Francis Winnington*, arguing upon *Fitzharris*'s trial for the continuance of an impeachment after a diſſolution of parliament, reaſons upon looſe, and weak analogies, *but without a hint at the order of* 1678:—"I "contend (ſaid he) that whether the parliament "is in being, or is at an end, the impeachment "is depending, with all its energies."—And how does he maintain it?—By the order of

1678?—No, it is not once *named*; though to *name* it, would have determined *Fitzharris*'s plea to be good in ſubſtance; and though to name it with reſpect, would have done honor to that Parliament, which his political bias would have prompted *him* to honor.—Did he maintain it by ſome one of thoſe precedents "in *all ages*," which had been ſearched *three* little years before, when he was keen in the purſuit?—By not a ſingle precedent, of any kind, except the ſolitary one of *Berkeley's Caſe*, not in the report of 1673—not an impeachment, but a very unaccountable proceeding, by which that culprit was tried in Parliament before a jury—was acquitted by them—and then bailed for his appearance at the next Parliament, *ad audiendum judicium*, &c.

We recollect, that he was manager in *Lord Stafford*'s trial, THREE MONTHS before this indictment;—yet of that caſe too not a word!—though he was in the act of attempting to ſuſtain the *very point* for which the "*noble blood*" of this Peer had been ſhed.—Is is unfair to ſay, that he was aſhamed of *that* proceeding too, and before *Lord Stafford* was cold in his grave?

The reſult of this tranſaction is, that after the lion was *dead* (or had begun his *nap*, according to the modern doctrine), the parties and their counſel, by common aſſent, *choſe* to *forget* this

Order of 1678, or laid it aſide, as if all its powers fell, when that corrupt, and factious Parliament was no more. They ſeem to laugh in one another's face, as the Roman augurs did, when they met, and were not in office.

The leading advocate for a culprit, who was the favorite of the Commons that were "*only* "*aſleep*," has nothing to ſay for the continuance of an impeachment which they had preferred, but this:—"It continues, becauſe the "Parliament is in being ſtill, *upon record*; as "the *Attorney General* has not counter-pleaded "the diſſolution of that Parliament, which all "of us know to be the fact."—But why did not he argue thus (a doctrine more to the point, and more judicious for his client):—"The "impeachment is depending, becauſe it has "been carried up to the Lords; and, after a "diſſolution of Parliament, all impeachments "are depending, by the law of the Peers, made "in 1678?"

Perhaps the beſt clue to this very ſingular fact, would be that ſuppoſition which I have already intimated, *viz.* that by this Order of 1678, the Lords pointed only at thoſe individual impeachments, and left the general queſtion, or the fate of any *other* impeachment under new circumſtances, afloat.

I have

I have called it as it now appears, not only a *fact*, but *precedent*; and though in *ſtrictneſs* it cannot reach the latter deſcription, in *ſenſe* it can; for that, may *in ſenſe* be called "*precedent*" againſt the weight, or credit of any judgment, which proves, that *in recenti facto* the judgment itſelf, and where it might have turned the balance, is neither quoted in the public trial of an indictment by him who had the intereſt of his *life* at ſtake in it, nor ſuggeſted in his favour by the Court who tried him.

The inference muſt, upon the whole, be this: Either the Order of 1678 was given up on all hands, as the political, and fleeting expedient of a day, for a party-object, or as pointed ſingly at *thoſe* impeachments, to which it expreſsly referred, and at *their* peculiar condition.

This laſt alternative might alſo account for the continued impriſonment of *Danby*, *after Fitzharris*'s trial (for the Order might ſtill have its force againſt *him*, as falling directly within the reference of it); if other ways of accounting for that impriſonment could not readily occur, without prejudice to the general doctrine "that "impeachments, after a diſſolution of Parliament, "do at this day, *legally*, and *conſtitutionally* abate."

"But

" But if the Order was not imperative upon " the Conſtable of the Tower, why continue " his impriſonment one day, when the Peers no " longer exiſt as a Court?—why refuſe to " bail him at the inſtant, but under the idea of " a coercive authority over him, reſulting from " the impeachment, which a future " *organ of* " *the people*" will, or may reſume?"

The argument conveyed in this queſtion, is more ſpecious, than ſolid.

Firſt, the refuſal of bail to the *Earl of Danby*'s frequent, and goading importunities, appears to have been the effect either of cowardice, of ſervility, of corruption, or of prejudice againſt him, with a reference to the Popiſh plot; from which prejudice, none were exempt, or would have owned it if they were. I have ſtated the effect that *Fitzharris*'s perjuries, after his conviction, threw upon the original credit of *Danby*'s concern in *Godfrey*'s murder. In the mean time, the Order of 1678, pointed, and clear with a reference to the *Earl of Danby*'s impeachment, hung over the Courts of Law; ſo that it became extremely difficult for them, in ſuch an age, and ſuch men as they were, to accept *his* propoſition of bail, though in a caſe, which,

upon

upon the ſoundeſt principles of their diſcretion, fairly, and irreſiſtibly called for it.

Jeffreys, however, took upon him the riſque of bailing him; and it is an act, which, in my opinion, does him infinite honor; let that monſter of cruelty and of injuſtice be vindicated, and even commended, where he deſerves it.

Will any man contend, that a commitment by the lords for high treaſon is not bailable with ſtrict propriety, if the charge upon which the commitment is founded, contains no ſuch *offence*, though it gives that *name* to ſomething elſe?—or, can it be ſaid, that if the charge *had* contained high treaſon, there was not ground for bail in the duration of *Lord Danby*'s impriſonment, and the tacit *waiver* of his proſecution?

In the caſe of *Lord Stafford*, applying for bail, the court of *king's-bench* obſerved,—" that he " was committed for high treaſon, by the lords; " —that commitments for high treaſon upon " impeachment, were not within the *habeas* " *corpus act*, and conſequently not bailable *de* " *jure*, for want of proſecution;—that it be- " came therefore a mere point of *diſcretion*, and " that upon *their* diſcretion, they did not think " it proper to bail him."

" But why *not* within the *habeas corpus act*, " if the impeachment was not ſtill in force?— " for could not he have argued thus?—" The " impeachment being at an end, I could have " been indicted;—I have not been indicted, or " tried, as the act preſcribes;—I am, therefore, " *de jure* bailable." The anſwer is, that he *could* not have been indicted or tried at law upon *this charge*, and at the ſuit of *this proſecutor*.

They *could*, in *Stafford*'s caſe, have ſaid:— " Our diſcretion prompts us to *bail* him."— If they *could*, let me aſk, if the diſcretion of courts, either to bail, or to remand, is not, of itſelf, deciſive to ſhew, that it is not the *impeachment*, but the opinion of theſe courts alone, that between parliament and parliament either detains, or bails, or liberates the culprit. If *that* be conceded, as I think it muſt, I would then obſerve, that our conſtitution is not apt to do things by halves; and the idea that a court of law may defeat an impeachment for high treaſon, by ſetting the culprit free, if the parliament is barely *adjourned* (which is a right at law, clear of doubt) proves *à fortiori*, that no houſe of peers can have the leaſt controul over an impeachment, after " *the new court*," (according to *Chief Juſtice Relle*,) by which alone they

they ſit has been diſſolved;—that is, when the parliament itſelf has met with a ſimilar fate.

Here, at leaſt, is a dilemma that requires a very ſerious, and a very accurate ſolution.

Either the right of bailing in the court of king's-bench, after a diſſolution of parliament, a culprit impeached by the commons, and impriſoned by the peers, affords evidence, and proof, that after a parliament is at an end, there is no depending impeachment;—or admits that there is.

If the *firſt* be the reſult, there is an end of *that* queſtion.

If the *latter* be a more correct inference, what can be a more glaring *precedent* (if I may uſe the phraſe) of that *jealouſy*, which in my firſt letter I deſcribed as the ruling ſpirit of our conſtitution? for here, then, will be another admitted check upon the *indefeaſible* right of the commons to impeach *with effect*:—a right, which is more dangerous, in my view of it, than a right of diſſolving an impeachment, by the diſſolution of a parliament, which is *denied*; or the right of bailing the party impeached in the courts of law, which is *admitted*. Both of theſe rights are formed upon ſimilar analogies, and are both of them liable to extreme abuſe;

with a material difference, however, in point of reſponſibility between them; for the diſſolution of parliament is an act which can be met, and reſented, if it was an abuſe of the regal truſt, by the next houſe of commons; but, "*robes and* "*furred cloaks hide all.*" The court of law would have only to ſay—"It was for our pure "diſcretion to bail, or to remand him; and our "diſcretion prompted our judgment,—our con- "ſcience to bail him."—What houſe of commons can touch them for it?

Here, too, is another, and ſtriking proof, that *Mr. Burke* is more afraid of lawyers, and the law, than our conſtitution is, which reſigns to *them*, even during a petty adjournment of the legiſlature, a power of releaſing *their* ſuitor from that ſtate priſon which alone enſures his appearance, which alone compels him to abide a juſt proſecution as a delinquent of ſtate, accuſed by the whole commons of the realm, before the peers of the realm, in their judicial court, for, perhaps, the worſt of all political offences; though not of a kind which the regular habits, or powers of law would reach with effect.

I have the honor to be,

SIR,

Yours, &c.

LETTER THE EIGHTH.

Non modo eventus rerum, ſed ratio, cauſæque noſcantur.
TACITUS.

SIR,

" WHAT ſhall be ſaid (we are aſked)
" of the applications for bail, and fruit-
" leſs applications too, in the court of king's-
" bench, when the order of 1685 had been put
" upon the journals? Why did the two catholic
" peers, *Lord Peterborough*, and *Lord Saliſbury*,
" continue to be impriſoned *one day** in the
" tower, when the commons, who had *im-*
" *peached* them, and the peers, who had *com-*
" *mitted* them, were no more?—Why did *Lord*

* This queſtion has not the merit of originality;—for the dilemma which it endeavours to impoſe upon the argument, was alſo attempted, but without effect, in *Streater's caſe*, more than a century ago, by the attorney general: " If the " order die (ſaid he) by the diſſolution of parliament, the " jailor ſhould then have ſet open the door:" And he recommends an action againſt him.—Yet the party, who had continued *in vinculis* under that order, was liberated by the court, upon the ſingle idea that no order exiſted, or could be reſumed. This too is the more ſtriking, becauſe the *court of the parliament* then reſided in the commons alone, who had alſo in themſelves *the legiſlative power*. But an " *order* of " parliament," and an " *act* of parliament," were diſtinguiſhed by the court; nor was the effect of a diſſolution upon either of them at all varied in the opinion of that court, by the accident of uſurpers in the *legiſlative* or *judicial* power.—The old analogy remained, and was affirmed with ſpirit by a court of law.

" *Saliſbury* aſk for bail, in the court of king's-
" bench, and aſk for it in vain; that high
" court not even condeſcending to *name* the
" order of reverſal in 1685?—And why did
" *Lord Chief Juſtice Holt*, in a later caſe, de-
" clare, that impeachments continued between
" one parliament and the next?"

I ſhall give a diſtinct anſwer to every one of theſe queſtions.

Firſt, If it were true that impeachment *ſo far* " depended," after the end of a parliament, as to continue the *impriſonment* of the culprit upon that ground alone, ſubject only to the diſcretion of bail; it would not follow, that it would therefore " depend" for another, and a very different purpoſe—that of proceeding upon the ſame impeachment againſt him, and putting him upon his trial in the next parliament; unleſs the *uſage* were equally eſtabliſhed in both of theſe acts, or the *analogy*, irreſiſtible between them.

The *next* obſervation is, and, as it ſtrikes me, a complete anſwer to this corollary, which has been drawn from the continuance of *priſon* to that of *impeachment* for all its *other* purpoſes; that an order to impriſon, made by a power legal at the time, upon a legal charge, binds the cuſtody of that culprit, when the power that firſt committed him has no further controul over him, till he can be legally diſcharged by ſome courſe

courſe of trial,—or can demand bail *de jure* within the *Habeas Corpus act*,—or can obtain it from the *diſcretion* of thoſe to whom the law refers him. That celebrated act (which, by the way, is very ill drawn—*tantamne rem, tam negligenter agere!)* gives no ſpecial power to the courts of law over a warrant that has treaſon or felony in it, " plain " and ſpecial," unleſs where a term ſhall have intervened, without indictment, and without juſt apology for the delay;—or where another term has alſo intervened, without indictment or trial.

The act, therefore, does not reach impriſonment by the lords for high treaſon, plain and ſpecial upon the commitment, if the party ſo committed has been *impeached*; becauſe he is no object of trial by indictment *upon that ſuit*;—as I have before obſerved.

Thus, when *Lord Stafford*, who was clearly within a direct, and expreſs view of the order 1678, applied for bail, after an impriſonment of two years, to the court of king's-bench; they refuſe to bail him, upon their diſcretion (explained as I have already intimated), and, as they expreſs it themſelves, " *without any re-* " *liance upon the order of* 1678."

Therefore, as being impriſoned, *all* theſe peers, with, or without reference to *either* of the orders, *before* 1685, or *after* it,—were liable to that im-

priſonment, as being legally charged, and legally committed; unleſs they could ſatisfy the court, that bail ought, in juſtice, to have been accepted.

But we are then told, " In *Carthew*'s Report, " of *Lord Saliſbury*'s application, the order of " 1685 is not once *named*; and bail is *refuſed*, " under circumſtances which prompted every " idea of a rational diſcretion to *receive* it; un- " leſs the court had thought it competent for " the houſe of peers, then adjourned for two " months, to reſume this very impeachment, " by *their* diſcretion. For if the impeachment " was at an end, and therefore *could not be* re- " ſumed, what ſpecies of diſcretion was it in the " judges of this court, that kept this peer in " jail, for the ſake of keeping him there!"

As this objection is very ingenious, and colourable—as theſe too were times in which the liberty of the ſubject held up its head, begun to *renew* its rights, to *feel* them, and act upon them, it becomes neceſſary to vindicate the conduct of the judges in that court, and account for it; though in ſtrictneſs it would be enough to ſay,—that if their diſcretion was abuſed, it would be no evidence that an impeachment was " depending" againſt the *Earl of Saliſbury* then; or is depending now againſt *Mr. Haſtings*.

It appears from *Carthew*, page 131,—that *Lord Saliſbury* was impeached by the commons for

for high treaſon;----that he was committed upon that impeachment by the houſe of peers, to the tower;—that he continued there, till that parliament was diſſolved, and a new one had been called; which after a long ſeſſion was adjourned for two months, at the very time of this application for bail or diſcharge to the court of king's-bench.

It was made upon two grounds:——

He inſiſted *firſt*, that he ought immediately to be *diſcharged*, as having been pardoned by the act which had paſſed in the laſt ſeſſion of parliament.

But as there was no proceeding in court, upon which this plea could be founded, the judges, who could not judicially take notice of the act, unleſs pleaded with neceſſary averments, refuſed the *diſcharge*, as claimed upon that ſingle ground of the pardon.

Then it was moved—that *bail* ſhould be accepted for him; upon a reference to the *Earl of Danby*'s caſe, who was bailed though committed for high treaſon, upon impeachment: —The court refuſe to *bail* him:——

" Becauſe there was a ſhort adjournment of " the exiſting parliament, and becauſe he ſhould " apply to the *peers*, for his bail."

" The *Earl of Danby* (they tell him) was " bailed, becauſe the parliament of thoſe days " was *prorogued*, the time left uncertain for its " meeting again, and he had no proſpect of an " application there."

The caſe of *Lord Stafford* was alſo mentioned by the court, as proving, " that commitments " by the peers in parliament, are not made " void by the diſſolution of it."

It is alſo intimated, " that when the *Earl of* " *Danby* was bailed, the recognizance bound " him to appear at the next ſeſſion of parlia- " ment; which condition affirmed the commit- " ment, and proved the opinion of the court, " that it was not avoided or diſcharged."

This is the full effect of *Lord Saliſbury*'s caſe, in *Carthew*, and ſtated with punctual accuracy in all the eſſential points of it.

The conſequences of it have been argued thus:

" At this time, the court of king's-bench " looked upon the reverſing order of 1685, as " of no effect in law; for, elſe, they *muſt* have " *liberated* the Earl upon the ſingle ground " that his impeachment was at an end.

" The

" The notice taken by the court, of *Lord* " *Stafford*'s caſe, and the anxiety which they " ſhew to point out, that even in the act of " bailing *Danby* his commitment was affirm- " ed, ſtrongly indicate one or other of theſe " propoſitions: a perfect ignorance of the " order in 1685; or an opinion, that upon " that order they could not act in their judicial " character. Either of theſe alternatives throws " a ſhade of legal diſcredit upon the order of " 1685, in that enlightened period, which " makes it impoſſible for a lawyer in this age " to utter one ſyllable more in its favor."

It muſt be confeſſed, that in the report, no mention is once made of the *order in* 1685; but it ſhould alſo be confeſſed by the partiſans for the *order of* 1678 (which alone they ſet up againſt that of 1685), that a ſimilar fatality had buried *that* order too in legal oblivion, if the ſilence of this Reporter upon either of them is fatal. The court (according to *him*), even the act of ſtating the applications for bail made by the *Earl of Danby*, *at whom the order was levelled*, clearly diſown the effect of it upon them, as keeping *Lord Saliſbury*'s impeachment alive; but conſider the caſe juſt as if no ſuch order had ever iſſued: leaving it entirely afloat, whether a new parliament, or a new ſeſſion,

could or could not proceed againſt *their* ſuitor, the *Earl* of *Saliſbury*.

I cannot forbear, however, to conjecture, that even if the order 1685 *had* been mentioned by this Earl, and had been expreſsly made one of his grounds for the *diſcharge* which he ſolicited, the court, attending to all the circumſtances, would have doubted, whether a ſound, and a judicial diſcretion would have authorized them to comply with his requeſt.

I am alſo of opinion, that a refuſal to comply with it, could not even in that period have been fairly interpreted as a diſavowal of the order of 1685 in its general effect; if mentioned, and preſſed by the Earl himſelf.

Much leſs could it be ſo conſidered at this time of day, by thoſe who are *willing* to remember, and weigh diſpaſſionately, all that has happened *ſince that period*.

It is true, that when the court argued upon the caſe of *Stafford*, and of *Danby*, the order of 1685 might have been ſet up, as counteracting, and as annihilating the general effect of thoſe precedents: but would not they have been juſtified by

by the conduct of *Lord Salisbury* himself, in a *doubt* whether the order of 1685 *had* the effect which he would then have challenged, but *so late in the day*, I mean *for him?*

They tell him—" the house of lords was " *the best place for his application.*" Of that, and of the other house there had been " *a very* " *long session*;"—a fact which is particularly noticed in the report. If the earl *had* applied in that session, would not the court have naturally inferred, as he remained *in vinculis*, that bail had been refused him by the peers?—and if bail *had* been refused him *in that place*, would it not have shaken the authority of the order 1685?—If he had *not applied*, would not the continuance of his imprisonment and his own forbearance to apply in parliament, when the peers were sitting, call upon the judges in the court of *king's-bench*, to *hesitate*, before *they* determined that an order, apparently so little *respected* by those who made it, and so little *trusted* by those for whom it was made, had really destroyed the effect of those two precedents in *Westminster-hall*, which *they* had quoted as affirming the right of a continued imprisonment, or at least, of bail for the security of appearance to a charge, that *might* be *resumed?*

Beſides, if the *Earl* had forborn to attempt his own relief, by aſking the opinion of his own peers in their judicial character, *during a long ſeſſion*, would it not have been a very ſafe diſcretion, if the court, in anſwer to his precedent of 1685, had ſaid—" it is a very ſhort adjourn-" ment; aſk the lords what effect *they* aſcribe " to this judgment of their own!—*You*, and " *they*, together, have made the validity of it " ambiguous to *us*, and have made it peculiarly " fit that you ſhould yourſelves together ſettle " the doubt."

But the main queſtion is, what the lords *finally did* in the caſe of *Lord Saliſbury* himſelf, upon the chapter of this very impriſonment.

If in that very caſe *they* acted judicially, upon a marked principle, which aſſumes the termination of an impeachment by an end of the power that impeached, and the termination of an impriſonment by an end of the power that impriſoned, *they*, who are the beſt, and ſupreme authority, have cleared up, in the very ſame cauſe, any doubt which might have been entertained upon the *Earl of Saliſbury*'s recent application to the *king's-bench*. They have conſigned all that was done *at law* in thoſe caſes of *Danby*, (who indeed had been alſo diſcharged in 1685,

by a judicial act) and of *Lord Stafford* himſelf, to legal oblivion.

That, in fact, the houſe of peers *finally diſcharged* both of theſe catholic peers; aſſerting, in a *judicial form*, or at leaſt with a judicial *act* and *effect*, the diſſolution of *Lord Saliſbury*'s impeachment, the following letter I think will prove. If it ſhould, let the authority of parliament, in *Lord Saliſbury*'s caſe, as well as in other precedents, that accompanied or followed it (and which at preſent I will not anticipate), be oppoſed againſt the authority of the *king's-bench* in that caſe.

The court of law, in thoſe days, (faſtidiouſly, as the houſe of commons may look at a journal of the lords in this triumphant hour of *privilege,)* meant in *Lord Saliſbury*'s caſe, to be ultimately governed by the *judicial opinion* of the lords;—and if it can be made out that by that *judicial opinion* the impeachment was annulled,—can it be doubted, that at any future period, the court itſelf *muſt* have held the authority of their own doubts, upon which they refuſed the *Earl of Saliſbury*'s bail, completely done away, and reſcinded, by the higher

higher act of that ſupreme, and judicial power *to which they expreſsly referred him?*

It may be further obſerved, that when they point at *Lord Stafford*'s caſe as the authority upon which they refuſe bail, they point at a caſe in which it appears, that upon that unfortunate perſon's trial, *Sir William Jones*, one of the managers, affirms, the law which kept his impeachment alive, to have been ſo declared by the houſe of peers (alluding to the order of 1678); "and that *being ſo*,"—two very emphatical words!—"it was become (as *he* inſiſted) the "law of the kingdom:"—By which he could only have meant, that it was become the law of the kingdom, *becauſe* the peers had reſolved it as the law of *their* tribunal. This too appears more evident, when he gives to the high court, then aſſembled, his ground of "*hope*" (as he calls it,) that the commons were authoriſed by good reaſon, to act upon the impeachment;—which ground he deſcribes to be,—"that the "lords had thus declared *the law* of *their* "houſe to the commons." If the lords then, at a later period, have declared the law of *their houſe*, and (according to *Sir William Jones*) the *law of the kingdom*, to be the direct reverſe, could the court of king's-bench, after the

the reverſal of the order in 1678;—after the lords, by *acting* upon the order of that reverſal, in the diſcharge of perſons impeached, had judicially notified it as the law of their houſe;—*could* the court of king's-bench, duly apprized of that circumſtance, have referred themſelves to the caſe of *Lord Stafford*, as juſtifying a refuſal to bail, upon the order of 1678 alone?—*Could* they have done this, when that very order was no longer a *law of the peers*, and was, therefore, no longer a *law of the kingdom?*

Upon *Lord Stafford*'s trial, indeed, *Sir Francis Winnington* urged, with miſerably inferior talents, what has been impreſſed with ſuch energy upon the debate of theſe queſtions;—"that an impeachment was, in truth, an act "of the commons out of parliament, and was, "therefore, kept alive by *them*, in every "change of their elected repreſentatives."

Whether I have refuted, or ſhaken, in a former branch of this imperfect eſſay, that hypotheſis; or left it as firm as eloquence could have made it *ſeem* to be,—the reader will determine for himſelf,—I am all humility before *him*;—and as to *you*, Sir, I am ſo afraid of your *wit* (the only form in which I can be ſignificant enough to be honoured with your diſpleaſure), that

that if I can eſcape even that modeſt pre-eminence of being "the cauſe that wit is in other "men," I ſhall feel comfort in the obſcurity which enables me to exclaim—"*effugere eſt* "*triumphus.*"

I am,

SIR,

Yours, &c.

P. S. I had forgot the *dictum* aſcribed (by thoſe who affect a contempt for the lawyers) to *Lord Chief Juſtice Holt.* Is it worth anſwering?—The anſwer is in a word; but the evidence of it, in a dull, and confuſed report.

The tenor of *reaſoning* there, (if it merits the name,) is in direct oppoſition to the idea of a continuing impeachment; and the report is abſolute nonſenſe, if *Lord Holt,* in *that part of it,* affirmed the doctrine: for it would make him coarſely, and abruptly, confute himſelf.

If he had ſaid the direct reverſe, a ſemblance of more uniformity at leaſt, if not of more accuracy, would be given to this report.

The queſtion was—"if *a writ of error* to "the next *ſeſſion* of a parliament ſuperſeded exe-"cution;" *Lord Holt* is made, in the firſt breath, to

to ſay, that impeachments may continue between parliament and parliament, which he could not *have ſaid with truth*, after the order of 1685, and the conſequent act of the peers, had ſaid the reverſe, and which he could not *have had occaſion to ſay*, if it was true; becauſe, that very order had continued writs of error to the next parliament. In the next breath, as if to help that firſt propoſition, he cites a caſe which proves a writ of error *no* ſuperſedeas, if a parliament is *prorogued*, and of courſe to *a day certain*, but a term intervenes.

The final reſult of an argument ſcarce intelligible, but evidently tending to make the writ of error *no ſuperſedeas*, in other words, to conſider it as *abated*, in that view, tells the parties, with all due ſolemnity, " that it leaves them " to do what they *can* at *law*;" which, though not very comfortable words in the ſound of them, rather import the idea of a right in the original plaintiff to act upon his *judgment at law* as if the writ of error had not ſtood in his way.

LETTER THE NINTH.

—— tuus jam regnat Apollo.

SIR,

I AM come to a period, which, in the general date of it, will be ſure to command your attention, reverence, and love. The air is pure, and we tread upon conſecrated ground.—Was the conſtitution ever ſo accurately underſtood, ſo religiouſly felt, and with ſuch a calm dignity of ſpirit enforced, as in 1689-1690!—The charter of *Runnymede*, had ſketched a very animated outline of our liberties.—The **ſecond charter* of them in the *bill of rights*, brought them home to us, and made them as practicable, without injury to the executive power, as it made them jealous in their checks upon the abuſe of it. The vigilance of *two great parties* (loſt at an ill-fated hour in the factions that convulſed the early periods of this preſent reign!) was tempered by a common zeal for the public intereſt, with ſhades of difference in the mode of accompliſhing it. Not a ſingle meaſure was careleſs, or corrupt,

* The *petition of right*, and the *habeas corpus act*, were, as far as they extended, of ineſtimable value; but, comparatively to the *bill of rights*, they were ſhort, and imperfect.

as

as heretofore; but every thing was canvaſſed, and the jealouſy between the two Eſtates, though it became dignified, had not loſt either its acuteneſs, or ſpirit.

Under theſe powerful auſpices, in defiance of the moſt exquiſite ridicule that ever enchanted the houſe of commons, who at any time (if it is not a libel upon them to ſay it) prefer a good joke to a good argument, I muſt bring forward Sir *Adam Blair*, and ſee if *truth* will not once prove that *ridicule* is *not* the *teſt* of it.

Sir *Adam Blair* (or *Gordon*, if you prefer the name for the ſake of the ballad) with certain others who had been impeached by the commons for high treaſon, was upon the 4th of July 1689, by an order of the peers, impriſoned. Their treaſon was that of publiſhing in the month of June, a declaration by King *James* dated in May, by which he half invited, and half bullied the ſubjects of King *William* into arms againſt him.

Whether ſuch an offence at this day, conſtitutes *high treaſon*, has been doubted in modern times *;—but it was at leaſt a high crime,

* *Mr. Juſtice Foſter* inclines to the opinion, that it would not be *high treaſon*, unleſs "with a *reference* to ſome *treaſonable* "*act* then *on foot*, or *intended*."—Theſe are looſe words, and the whole paſſage is very obſcure.

and miſdemeanor, of the moſt alarming effect, at ſo critical a period.

Upon the 25th of October in the ſame year 1689, the commons firſt impeached the *Earls* of *Saliſbury* and *Peterborough*, (then priſoners in the tower,) for high treaſon.—*Their* treaſon had no doubt upon it: and as it was the offence of ſhifting their allegiance to the Pope, it was not likely at ſuch a period as that of July 1689, to be touched with a feeble hand.

The impriſonment of Sir *Adam Blair*, &c. remained as long as the parliament. Further proceedings were had upon it, but no day was appointed for his trial.

The parliament was, upon the 6th of February in the ſame year 1689, diſſolved.

Upon the 20th of March 1689, the parliament is again aſſembled;—and upon the 1ſt of April 1690, the *houſe* reſolved " to bail Sir " *Adam Blair*."

The very *next* reſolution upon the journals is in theſe words:

" Ordered—That on Wedneſday next this " houſe will take into conſideration, whether " impeachments continue from parliament to " parliament."

It

It was then ordered as follows:

" That on Monday next, Sir *Adam Blair* " ſhall put in bail."

Here, then, let us pauſe, and obſerve, that with a reference to the caſe of *Blair* at the commencement of that parliament, before the impriſoned peers had made any application, the lords determined critically to examine this litigated queſtion, of a " depending impeachment," but were either, upon the firſt bluſh of it, ſatisfied concerning it, ſo far as to bail that culprit, though committed for high treaſon, or muſt have ordered his bail upon ſome *political* diſcretion of their own (and after they had themſelves impriſoned him), *without offence to the commons*.

Upon the Tueſday following, this order is made:—" That on Thurſday next, the houſe " will take into conſideration, whether impeach- " ments continue *in ſtatu quo* from parliament " to parliament; and alſo, whether the courts " in *Weſtminſter-hall* may proceed in the in- " tervals of parliament, after appeals or writs " of error are depending in this houſe."

Upon Thurſday they order, " That, on Tueſ- " day next, this houſe will take into conſider- " ation, the ſtate of impeachments, whether

" they continue *in ſtatu quo* from parliament to " parliament; and alſo the report from the " lords committees, appointed to examine and " conſider, whether the courts below may pro- " ceed in the intervals of parliament, after ap- " peals or writs of error are depending in this " houſe."

The *very queſtion* here put, which could not eſcape the knowledge of thoſe in the other houſe who were the beſt friends to the rights of the people that ever ſat there, announced a ſuſpicion at leaſt, that the order of 1678 was at an end, or contained bad law. But it gave no alarm, nor was " privilege" offended by it, any more than it was by the releaſe of the culprit upon bail.

No further ſteps were taken, and the parliament was prorogued to the 7th of July 1690. It met again for buſineſs, upon the 2d of October in the ſame year.

It muſt here be admitted, that, from April to July, the impriſoned lords delivered no petition, even after the queſtion reſpecting the continuance of impeachments had been appointed for diſcuſſion upon a day in the month of April, and though *Blair* had been actually bailed. How to account for this, or for the reaſons which induced

induced the houſe to go no further as to the inquiry then, it is impoſſible for me to conjecture, nor is it very material; for, upon the firſt day of the parliament, October the 2d, 1690, a petition *was* preſented by *Lord Peterborough*, in which, *having ſtated the diſſolution*, and the act of pardon, he ſolicited that he might be diſcharged. *Lord Saliſbury* alſo petitioned; and, without ſtating the diſſolution of parliament, relied, as it ſhould ſeem, upon the pardon alone.

Upon the 6th of October the lords met again; and the judges were aſked, whether the offences of theſe Earls were compriſed in the act of general pardon.

They anſwer "yes," if their crimes were committed before the 13th of February 1688, and not in Ireland, nor beyond the ſeas.

Upon this hypothetical opinion, an immediate queſtion was put, whether they ſhould be diſcharged; and the lords reſolved in the negative, but reſolved to bail them.

The ſame day lords committees were appointed by the houſe, "to inſpect and conſider "precedents, whether impeachments continue "*in ſtatu quo* from parliament to parliament, "and having conſidered thereof, to report their "opinion to the houſe."

Upon

Upon the 9th of October, " It is ordered, " that the lords committees, appointed by " the houſe to conſider precedents, whether " impeachments continue *in ſtatu quo* from " parliament to parliament, have hereby power " given them, to ſend for the records of the " ſeveral proceedings in the court of king's- " bench, relating to the lords lately in the " tower upon impeachments, upon their mo- " tions for their *Habeas Corpus*."

Upon the 10th, " Ordered, that the lords " committees, &c. do meet to-morrow, and that " *Mr. Petyt* attend at the ſame time."

This gentleman was a famous antiquarian, particularly tenacious of the rights and " privi- " leges" of the commons.

No report was made till the 30th of October; which is not unworthy of remark, becauſe it proves with how much deliberation the lords had proceeded.

Upon this day (October 30th) *Lord Mulgrave*, having ſtated ſeveral precedents brought from the tower, has theſe words:

" Then

" Then the committee examined the jour-
" nals of the houſe, which reach from the 12th
" Hen. VII.; and all precedents of impeach-
" ments ſince that time, are in a liſt now in
" the clerk's hands; among all which, none are
" to be found to continue from one parliament
" to another, except * the lords' who were lately
" ſo long in the Tower."

Then followed this paſſage:

" After the conſideration of which precedents,
" and reading the orders made the 19th of
" March 1678-9, and the 22d of May 1685,
" concerning impeachments; and after a long
" debate thereupon, and ſeveral things *moved*,"
(which means, I ſuppoſe, mooted or debated;
for if they were motions in a parliamentary
form, they would appear) " this queſtion was
" propoſed, whether the two Earls ſhall be now
" diſcharged from their bail?"

" The previous queſtion was negatived; the
" main queſtion put, and reſolved in the af-
" firmative."

Is it refinement here, or is it plain, and ob-
vious inference, to conclude from all theſe paſ-
ſages taken together, that a legal termination of

* There is one ſlight inaccuracy in this exception—I ſhall touch upon it in the ſequel.

the impeachment, ſuppoſed by the lords to have reſulted from a diſſolution of parliament, was the real ground of the diſcharge?

If it was the pardon, how could it operate ſo ſo long even as ground for bail, and be made afterwards ground for diſcharge, without any reaſon aſſigned, or without evidence of the facts, which alone could make the pardon ſave thoſe peers?

But, at leaſt, will it be denied, that here the lords, in the face of the public, adopt (though not in expreſs words) the evident *opinion* of their own committee, that the impeachment was at an end?

If the pardon was their ground, they ſhould have apprized the commons of that circumſtance.

The entire diſcharge, under all the circumſtances, could only be juſtified upon the idea of their judicial opinion, that over the impeachment itſelf they had no juriſdiction; a point, which they, like other courts, were excluſively to determine for themſelves.

But what makes the real ground of this diſcharge too clear for an argument is, that upon the 2d of December, *Sir Adam Blair* was completely

pletely diſcharged, upon the mere allegation, that he had been ready to appear "when ordered." What can this diſcharge have been grounded upon, but the impoſſibility of ſuſtaining an order for his appearance when the impeachment was no more?—Here too was a caſe of alarm to the commons;—for either *Blair* was diſcharged pending an impeachment for high treaſon, without any reaſon upon earth;—or it muſt have been upon the idea, that his caſe fell within that of the two lords, which it could only do in reſpect of the diſſolution, for there was no pardon that could apply to *Sir Adam Blair*.

As the catholic peers were firſt bailed, according to the caſe, and precedent of *Sir Adam Blair*, upon a general view, and memory of the orders in 1678, and 1685, *Sir Adam Blair* was, by a ſimilar train of reaſoning, liberated even from the gentle cuſtody of his bail, when the catholic peers had obtained their liberty.

In the houſe of commons was your favorite *Somers*, then ſolicitor-general. Would he have endured even a *ſuſpicion*, that an impeachment ſhould cloſe upon a diſſolution, if he thought it ſound, and eſtabliſhed uſage of parliament, that it ſhould not?

A very curious thing appears in the diſſenting proteſt, which in its very firſt reaſon does not ſeem to diſpute the doctrine, but rather points at the idea that *others* were to be helped by the introduction of it into the debate; not the two peers.

Here is another tacit, but ſtrong, though negative proof, that it was unexceptionable doctrine.

The reaſon is unintelligible, if it refers to the pardon; but if it refers to the doctrine as to impeachments, nothing is more clear.

The whole queſtion, as to impeachments, was reſumed, according to *Burnet*, with a view to *Lord Carmarthen*, who then became a favorite of *king William*, but was extremely obnoxious in the houſe of commons. They even threatened the vote of an addreſs, to remove him from the king's council, upon account of his former impeachment; a circumſtance, which makes it even more unaccountable, that the commons, upon a ſimilar ſuſpicion to that which the diſſenting lords entertained, ſhould not have taken fire at the mode in which the vote of diſcharge was expreſſed, leaving it equivocal at leaſt whether it was not upon the

the doctrine that impeachments were at an end with a parliament in which they had been incompletely acted upon.

The unqueſtioned excellence of theſe times is a powerful argument in ſupport of any doctrines affecting the conſtitution, expreſſed or implied by the lords or commons who then ſat.

Here too, "*the want of proſecution*" by the commons is not aſſerted, nor is the impeachment (as in 1701) *diſmiſſed*; but the vote conſiders it as gone.

I have the honor to be,

SIR,

Yours, &c.

LETTER THE TENTH.

Ille ſiniſtrorsùm, hic dextrorsùm abit; unus utrîque
Error;—ſed variis illudit partibus.

HORACE.

SIR,

TO diſcuſs, with impartiality, the *Duke* * of *Leeds*'s caſe in 1701, and that of *Lord Oxford* in 1717, (which are to be the only ſubjects of this Letter) I ſhall endeavour to avoid the *extreme points*, and what may be called, even as againſt *laymen*, the *apices juris*, in both of the oppoſite arguments; becauſe though ingenuity may refine upon them, it muſt either be

* It was archly ſaid in the houſe of commons, that he was *born to make precedents*; and it is whimſical, that he is always a witneſs for "*depending impeachments*." Before 1685, he is perſecuted by a *depending impeachment*, and a law to that effect is *made* for *him*;—natural enough in thoſe times:—But that after that very law ſhould have been reverſed, he ſhould come forward again with a *new* title of honor, upon a *new* impeachment, and be made a witneſs again for the departed order of 1678, not by a new perſecution, but in the very act of being liberated from that new impeachment,—is a moſt whimſical jump of the atoms!

wilful

wilful, and perverſe, or, at the beſt, very inaccurate reaſoning that can give them credit.

But reaſoning from both of theſe authorities—comparing them together—and comparing both of them to the earlier precedents—I ſhall hope to ſatisfy the reader, that whatever impreſſion he may have received from the orders of 1685 and 1690, has derived no prejudice from the order of 1701; and has derived advantage from *Lord Oxford*'s caſe in 1717.

It is *the fact*, that in 1701, an impeachment againſt the *Duke* of *Leeds* appears to have been diſmiſſed, and for this *one* reaſon—"becauſe it "was not proſecuted;"—*though a diſſolution of parliament had intervened.*

That order, by a young, but ingenious advocate, was conſidered in the debate as an *adjudication*—"that notwithſtanding a diſſolution "of parliament, impeachments are legally re-"ſumed, and proceed." He told us, "that "it was the *laſt* judgment of the peers upon "this litigated queſtion; reſtoring the order of "1678 by the reverſal of that in 1685,—and "itſelf unreverſed." It ſeemed in general agreed, that he had miſtaken theſe analogies, though he ſupported them with ability; and with

with an impreſſion upon all who heard him, that his errors were thoſe of an acute underſtanding.

It is a familiar principle of law, though rather implied, and acted upon, than affirmed, that if two points of argument, or fact, are *alleged*, by either of the parties in a ſuit, or by a culprit in his defence, or by a petitioner in his complaint, as reaſons for a judgment of the court, and the court giving judgment in his favor, *expreſsly* adopt only *one* of them, it is at leaſt no *adjudication* againſt the legal weight of the other.

Thus in *Fitzharris*'s plea two points aroſe; one of them was the *form*—the other was the *ſubſtance* of that plea. When the court avoided the queſtion upon the ſecond ground (which it was in their power to do) by the nature of their opinion upon the firſt, and ruled the *form* to vitiate this plea, they did not adjudge the *ſubſtance* of it, upon which they ſaid nothing, to be good.

Many reaſons may be aſſigned, why a court with peculiar diſcretion may refuſe to adopt one of two reaſons for their judgment, *alleged* at the bar, even if they agree to it, and may obſerve a dead ſilence upon it.

But

But even leſs can the idea of ſuch an *implied adjudication* be aſcribed, either by *lawyers* or *laymen*, to a caſe in which, out of two points in his favor, the party himſelf *chuſes* to allege *one*, and prevails in it; or throws himſelf in general upon the court, and *they* give *one* reaſon, which is a ſufficient authority for them to comply with his requeſt; uttering not a ſyllable upon other topics, which might have led them to the ſame act.

Nay, even if they refuſe to adopt *one* of two reaſons alleged, and give it as their direct *opinion*, that if it ſtood upon that reaſon alone, the party would not ſucceed, but then do for him what he deſires of them, with a reference to the other ground; that firſt opinion is conſidered as *extrajudicial*, and the ſubject of it is juſt as open to legal diſcuſſion as ever.

Nor is it, as it was repreſented, neceſſarily a *binding* adjudication, or precedent, becauſe it is the *laſt*. It has weight, upon that account, and ſo it has *at law*; upon this idea, that judges in general pay a deference to the ſuppoſed accuracy of their predeceſſors in a ſolemn deciſion; but the deference is by no means implicit, or blind, unleſs where the deciſion is of remote antiquity, and the cuſtom of the law in adopt-

ing it ever ſince, has given to it another weight, though at ſuch a diſtance of time they are not able to account for it, or even ſhould have no ſcruple to reſcind it if it had been recent. In all other caſes, it is not the comparative *date* of the judgment, that affirms it, but the *law* contained in it, in the opinion of the court who are ultimately to rule it. Of this I can give you a memorable inſtance, familiar to the lawyers, and of no other conſequence at preſent except as a point of legal curioſity.

Before the act of parliament which made legatees and creditors admiſſible witneſſes to a deviſe of land, it was held by *Lord Chief Juſtice Lee*, and the court of King's-bench, that ſuch witneſſes were abſolutely incompetent.

After the act of parliament, a caſe aroſe in the ſame court of King's-bench upon a deviſe before the act, and upon the very ſame point which has been ruled *againſt* the competency of the witneſs.—*Lord Mansfield*, and his brethren, determined that he was competent.

After this *reverſing deciſion*, *Lord Camden*, and the court of Common-pleas, replaced the earlier judgment of the two by a judgment of their own, conforming to it.

I am

I am aware, that by this mode of reaſoning, I may ſeem to depreciate the *reverſing order* of 1685; but I have ſaid nothing in favor of it, that militates againſt theſe principles. For *cæteris paribus*, the later deciſion *is* the beſt;—but I have gone further; and proved, as I hope, the *good law* contained in it, as well as the countenance it has received from later *judgments*, or *judicial acts*. I am proceeding to ſhew, that no *judgment*, or *judicial act*, or even *extra-judicial opinion* of the ſame court has ever ſhaken it; but that in *Lord Oxford*'s caſe it was recognized, and affirmed:—not in a judicial *form*, I admit, or with a mathematical certainty of the fact; but with a natural, and plain impreſſion of it, which every man's common ſenſe, in my opinion, will entertain, when the circumſtances are laid before him.

As to the *order of* 1701, I can by no means think it a circumſtance of light, or trivial weight, as others have done, with whom I have in general agreed; and I am ready even to admit, that I ſhould lay infinite ſtreſs upon it, if it ſtood *alone*; as an authority (though I would not call it a *judicial* one) *againſt* the point which I am endeavouring to ſupport.

It muſt, in general, be conceded, that either the lords did not approve the two laſt precedents of 1685 and 1690;—or that for ſome *political* reaſon, with *two* ſtrings to their bow, in the *Duke* of *Leeds*'s favor, they choſe to uſe *one* of them *alone*, which they found eſſential to the caſe of the other peers; and which, being *a new* claim in the terms of it, (though within a general equity of their judicial powers,) they were anxious to announce in multiplied inſtances of it, though in *one* of them it was not wanted for the particular caſe.—A *third* alternative is, that having plain ground before them, which united *all* the caſes under *one* principle, "*the want of* "*proſecution*," they *overlooked* (I mean literally) the diſtinction as to the *Duke* of *Leeds*.

Let us examine theſe alternatives; but let it be admitted firſt, in return for my conceſſions, that if this order can at all wound the authority of thoſe in 1685, and 1690, or of the *acts* that accompanied them, it muſt wound them by an *intention* to depreciate their credit, either apparent, or naturally inferred.

I would therefore aſk, in this view, if it is conceivable that, in 1701, the peers *meant*, by the reaſon which they aſſigned for liberating the *Duke of Leeds*, to replace by a ſide-wind the

order of 1678, *not before them*, and, at one ſtroke, to overſet the judicial inference drawn in 1690, from a ſearch of precedents, at leaſt elaborate, and apparently impartial * ?—Or, is not *either* of the two other alternatives more probable?

It would have been a high diſreſpect for the order of 1690, if the peers had *ſaid* in the order of 1701, "being of opinion, that he has no "claim to be diſcharged, upon account of the "intervening diſſolution."—Would not many of the peers who had iſſued that order of 1690, have ſtarted up, and have claimed an audience in ſupport of *their judgment?* And could it have been *decently* reverſed, without a *debate* upon it?

* I was a little ſurpriſed at the condeſcenſion of a moſt ingenuous, and liberal mind, in ſtooping to the remark, "That *Scroggs's caſe* is omitted (evidently by accident) in "the liſt of precedents reported 1690, though conforming "to that of *Danby*, and the *catholic peers*."—Nothing was done upon it, and therefore it might ſlip from the attention of that committee; but more eſpecially, becauſe it was before the reverſing order of 1685, and poſterior to 1678: So that it was only the effect of the order 1678 *unreverſed*, and was not in the view of the remark which the committee made, by which they pointed at precedents, either earlier than 1678, or later than 1685; meaning to convey the ſame idea which is more accurately expreſſed by the diſſenting lords in 1717.

Between

Between theſe two periods of 1690 and 1701, there was *no* political diſtinction, as there *was* between 1685 and 1678. The peers in 1701, acted with as much patriotiſm as both houſes of parliament could have diſplayed in 1690; and, as their *main* conduct had ſo much honor in it, one ſhould leſs impute this kind of *trick* to *them*, for no conceivable purpoſe.

You obſerve, that it was not the point made by the *Duke of Leeds*:—But even let it be aſſumed that it *was*;—could any thing be more natural, than for the peers to *chuſe*, that without prejudice to his other ground, though *alleged*, he ſhould be releaſed upon *this*, when they were ſolicitous for the eſtabliſhment of it, with a view to their own general powers?

It is very obvious to me, that ſomething of a ſimilar kind was done as to the two catholic peers in 1690. The lords *could* have examined the effect of the general pardon upon that caſe, by comparing it with facts, which the authenticated evidence could have adduced, and without which, upon the *hypothetical* report of the judges, this act of general pardon became waſte paper, as to thoſe who claimed the benefit of it. But they *choſe* to deſert this obvious, and ſhort inquiry, for the direct purpoſe (whether political,

political, or conſtitutional) to liberate the peers, upon the *ſingle* ground (as they moſt clearly did) of the *terminated impeachment*. If they did this, in part, with a view to *Lord Carmarthen*, (who had the talent of being always execrated by the commons, under every title, and in every change of his politics,) I ſee no harm in it;—as the ſame reaſon which made *him* apprehenſive that a ſingle precedent, in ſuch a period as that of 1685, might not avail him in ſuch a new *æra* of things and men, as in 1690, might induce the peers to examine diſpaſſionately, and ſettle this point;—in order to redeem it, by *acting* upon it, if it was right in itſelf, or to renounce it, if it was wrong, by reſorting to the other topic, of the pardon alone.

It may be aſked, however, upon what ground it was, that in 1701, the law being thus clear, and ſettled, the *Duke* of *Leeds* deigned to rid himſelf of the impeachment againſt him which could not hurt him? I cannot anſwer for the *Duke* of *Leeds* in 1701; but it ſeems no violent ſuppoſition, to apprehend that he might think an *actual* diſcharge more convenient altogether than a *legal* one, and the diſmiſſion of *his* impeachment a better ſecurity for him than an order of that court upon *other* impeachments, *liable* to be reverſed, as *he* well knew, becauſe he

he knew the order againſt *himſelf* in 1678 had been actually reverſed in 1685.

But what is to be ſaid of the whole proceeding in 1717?

Here again triumphant ridicule (and the *knot* is *worthy* of the *god)* has been taken for the *teſt of truth*, againſt the moſt obvious impreſſions of as plain a fact, as ever came under the diſcuſſion of unbiaſſed men.

I again aſk of any individual, and let him have *your* talents, or let him have *none*, if he has but the uſeful character of a *ſenſible man*;—of *him* I would aſk, or, with equal confidence, of the acuteſt logician alive, two queſtions:—Are you thoroughly poſſeſſed of the facts upon record, and of the hiſtorical ones, obviouſly applicable to *Lord Oxford*'s caſe in 1717?—If you *are*, have you any *doubt* in your mind, though upon the evidence of analogy alone, that by the peers, aſſenting to that vote, or diſſenting from it, "*the end of an impeachment*, "*as reſulting from the end of a parliament*," was taken for clear?

If you are not apprized of the facts, here they are:—Examine them fairly, and then determine for yourſelf.

Upon

Upon the 10th of July 1715, this Earl was firſt impeached at the bar of the lords.

The *tory-peers*, who were numerous, and were *his* brothers in affliction, moved immediately two plauſible queſtions enough:—one for an adjournment only of two days, the other for a queſtion to the judges—" whether the charge " contained, or did not contain, high treaſon."

Both propoſitions were negatived by the *whigs* (for the term in thoſe times was more than a *ſound)*, though, as to the ſecond of them, it ſeems unexceptionable, and a very dignified caution againſt impriſonment upon grounds too haſtily aſſumed upon the *ipſe dixit* of the accuſer.

Upon the ſame 11th of July, this Earl was committed, in the firſt inſtance, to the gentle cuſtody of the black rod.

But upon the 12th, an order of the peers, and more ſpecial than cuſtomary, ſent him to the tower. The recital of it was—that he was impeached for high treaſon, and that *particular acts of high treaſon* were *ſpecified* by the impeachment.

Upon the 7th of September, his anſwer was delivered.—Upon the 19th of that month, a replication was put in by the commons; and the lords, upon the 21ſt, gave notice to the commons, that his Majeſty would give the orders for ſcaffolding, &c. in *Weſtminſter-hall.* I mention theſe dates and particulars (little in themſelves) to mark the zeal of his adverſaries, who were in full power, againſt him. Of this I ſhall make uſe hereafter.

Parliament was then adjourned to October the 6th; upon which day the king announces the rebellion in *Scotland.*

Then a fortnight's adjournment carried both houſes to the 20th; from whence, through ſeveral diſtinct intervals of new adjournments, they arrived in the end up to the 9th of January 1715-16; when the king made another ſpeech alluding to the rebellion.

In their anſwer to that ſpeech, the commons marked "the mal-adminiſtration of *Lord Oxford*, "as one great ſource of the rebellion;" this peer then lying under the weight of their impeachment.—In that which intervened, and was more accelerated againſt the rebel peers, a hint was given, that *Lord Oxford* encouraged *them.*—

Well

Well might *James the Second* exclaim, "*all* "*commons are the ſame.*"—No man admires their public ſpirit, and their political energy in this government of ours, more than myſelf;—no man exults more in the general advantage of their power to accuſe a miniſter, in, or out of place;—I think even the terror of it is of uſe, and the *juſt* exerciſe of it, one of the moſt eligible advantages in the government. But when I look at what I may call *the tyranny of their virtue*, in ſome of thoſe *judicial proceedings* which they have *in fact* inſtituted, I am ſuch a *tory*, that I cannot repreſs the horror which I feel in reflecting upon it:—Here, "*Tros, Tyriuſve,*" is nothing to the fatal precedent of ſuch intemperate conduct. If popular zeal is *ever* to inflame a court of judicature, I can ſcarce imagine two better victims of it than either of theſe Earls; but indeed, Sir, I am perſuaded that your goodneſs of heart will make you revolt at theſe inhuman prejudications of any culprit upon earth; and I muſt here do *you* the juſtice, to applaud your abſtinence from any ſuch modes of irritating the popular mind againſt *Mr. Haſtings.* He is the worſt enemy to impeachments, who can thus calumniate the *noble end* which they have in view, by the *mode* of profeſſing to attain, or follow it.

We left the *Earl of Oxford* in 1715-16, and early in that year we find him again, upon the 22d of May 1717, a ſuppliant at the bar of his peers, in a very modeſt petition, repreſenting, " that he had been impriſoned ever ſince the " 12th of July 1715;"—ſtating, " that one " *prorogation* had intervened;"—and requeſting, not a diſcharge, nor even bail, but in general terms, " that his impriſonment might *not* " *be indefinite.*"

An immediate order is made, " that all the " lords this day preſent be a committee, to " ſearch, and report ſuch precedents, as may " the better enable the houſe to judge, what " may be proper to be done on occaſion of the " ſaid petition, and the caſe of the ſaid *earl*, as " it now ſtands before this houſe.—That the " *earl*'s petition be referred to the ſaid com- " mittee, who are, in the firſt place, to ſearch " for, and report ſuch precedents, as relate to " the continuancce of impeachments *from ſeſſion* " *to ſeſſion.*"—Here one ſhould have thought they would have ſtopped, for this inquiry would have given the ſole ground which they took for the vote they iſſued;—but no — theſe words are added — " *or from parliament to parlia-* " *ment.*"

This

This clauſe not being *directly* to the point, *muſt* have been added for the ſake of *analogy alone*.

That analogy, as we know, *could* not, under all the circumſtances, if the *whigs* had common ſenſe, have been preſſed by *them*; becauſe the authorities upon *diſſolution* were againſt them: But for the *tories* to ſet it up, was natural; becauſe, if *they* could prevail in it, all the force of the orders in 1685, and 1690, would cover *them*, and their favorite.

It was the obvious policy of the *whigs*, no judicial precedent having reached the caſe of *prorogation*, either *in terminis*, or (as *they* perhaps concluded) upon ſound analogies, to *diſtinguiſh* the nature of *this* interval, from that of a *diſſolution*. It was the obvious policy of the *tories*, to unite, and confound them. *Lord Trevor*, a tory, and friend of *Lord Oxford*, was at the head of this committee.

Upon the 25th of May 1717, they reported.

They cite in this report many caſes reſpecting *diſſolution*; indeed all of them that were to be found; and I need not again ſtate the effect of them.

Reſpecting

Reſpecting *prorogation*, they cite very few, not, as I recollect, more than two;—that of *Lord Viſcount Mordant*, 1666; and of *Sir William Penn*, 1668;—which amount only to this concluſion, "that after *prorogation*, the com-"mons did not *in fact* proceed:"—Which, however, was not a circumſtance unfavourable to *Lord Oxford*, though it could not be of much uſe to him.

But they ſeem to lay ſtreſs upon the judgments in 1685, and 1690; they do not overlook the *Duke of Leeds*, in 1701; and they call into the liſt (for no very intelligible purpoſe) the *indictments* of ſeveral peers, unaccompanied with any account of the effect produced upon them by *either* of the intervals, and, I believe, unaccompanied by the *fact*.

The queſtion is then put, with ſtrict propriety,—"whether *prorogation* terminates im-"peachment?"

It is reſolved in the negative; and the diſſenting lords, or ſome of them, *proteſt*.

1. "Becauſe *there ſeems to be no diſtinction* be-"tween a prorogation and a diſſolution of par-"liament, which, in conſtant practice, have had "the ſame effect as to determination of judicial

"and

" and legiſlative proceedings; and, *conſequently* " *this* vote may tend to weaken the reſolution of " May 2, 1685, which was founded upon the law " and practice of parliament, without one prece- " dent to the contrary, except in the caſes which " happened after the order made the 19th of " March 1678, which was reverſed and annulled " in 1685; *and, in purſuance thereof, the Earl of* " *Saliſbury was bailed in* 1690."

Whatever artifice, or fallacy of argument may be contained in theſe records of diſſent (and I ſee *traits* of both in this proteſt), they are of ineſtimable value in one view, as *keys to the point of the debate.*

There was no pretence for determining this impeachment, unleſs *prorogation* fell within a perfect, or, at leaſt, a liberal analogy of *diſſolution.*

The enquiry therefore, as to the effect of *diſſolution,* was intruded upon the houſe, (by the medium of the committee,) on the part of *Lord Oxford*; the *whigs* not afraid of it, and therefore not reſiſting it.

That analogy, therefore, muſt have been preſſed in the debate; and the written diſſent is generally a reinforcement of the topics that

had been uſed by the peers who oppoſed the vote with a little more *ſting*, as the reſult, in part, of irritation at their defeat.—What ſaid the *whigs* in this debate, by way of anſwer to the *tories* in their attempted analogy?—Either *nothing*, which, in a debate ſuſtained by ingenious men, is not probable,—or that the two caſes were different,—or that being the ſame, they were both of them, in parliamentary law, caſes of *continuance*—not of *abatement*.

If they had made the laſt aſſertion, what could be more weak than for the *tories* to have proteſted as they did?—And *Lord Nottingham* (one of thoſe diſſenting peers) was not a weak man:—Would they not, inſtead of touching with a general commendation upon the orders of 1685, and 1690, have reaſoned at length upon them, and vindicated their propriety?—Would they not have anſwered in their *proteſt*, as they muſt alſo have done in the *debate*, thoſe grounds upon which theſe orders had been depreciated by their adverſaries?

On the other hand, if the *whigs* denied the analogy, they muſt either have denied, or admitted the law that was affirmed by the *tories* reſpecting *diſſolution* to be correct. If they denied the law to be good, this proteſt would be

abſurd;—if they admitted the law, it would he natural, and properly expreſſed.

The *effect* of their proteſt is to ſay:—"*There* "*is no doubt as to diſſolution*; and *prorogation* "is the ſame thing with a reference to *this* "point of determining an impeachment. We "are afraid of a *new precedent*; which profeſſing "*in terms* only to reach the interval of *proro-* "*gation*, may, in its conſequences, derogate "from the authority of that order in 1685, "reſpecting *diſſolution*, upon which you have, "yourſelves, judicially acted in 1690."

By the way, it is material to obſerve, how directly the *act* of the peers in diſcharging *Lord Saliſbury*, is referred by theſe proteſting lords to the judgment of 1685. That reference they muſt have aſſerted in the debate; and it muſt have been admitted, or they would have made ſome efforts to eſtabliſh it, inſtead of barely affirming it upon the written argument. I therefore call every peer in this debate, as a witneſs to the *fact*, that in *Lord Saliſbury*'s *caſe* the houſe of peers *did not* act upon the *pardon*,—*did* act upon the order of 1685.

What a mockery upon good ſenſe, good manners, and parliamentary decorum (in a houſe that claims the monopoly of it), if this proteſt had been written after a debate, in which the

order of 1685, and the effect of it in 1690, had been queſtioned!

What could have been the uſe of ſuch a fallacy?—The *whigs*, triumphant in reaſoning as well as in power, would have anſwered thus:—"*tend* to *weaken* the order of 1685! How "can it *weaken* that which has no ſtrength? If "it has, we *mean* to weaken it, we mean to de-"ſtroy it; *we told you ſo in the debate.* You "ſtate as an admitted point, that a diſſolution "ends an impeachment, as if conceded by us. "You cannot pretend ignorance that we made "you no ſuch conceſſion."

It is an anecdote, but of ſome importance, that *Lord Nottingham* was preſent (and it may be ſuppoſed not inactive) in the debates of 1685, and of 1690. It would have therefore been peculiarly diſgraceful in that peer, to have ſet up the validity of this order in 1685, by a general averment, if he had not felt his ground ſtrong under him, upon the ſubſequent confirmation given to it in 1690; and upon the agreed opinion of that ſame court in this very debate of 1717.

I muſt here impreſs upon the reader what appears to me, a juſt, and liberal diſtinction. Knowing of how little uſe would be the doctrine of retaining the impeachment for the purpoſe of a new trial upon it, after the unexampled prolixity of this, I have not expatiated upon the difference, wide as it is in general reaſoning, between that ſpecies of continuance, and what is now demanded by the commons, namely, the right of going on with an impeachment *upon which evidence has been heard.*—But in point of *uſage*, I take the diſcrimination to be this:—That if all the various precedents of parliament itſelf, applicable to the point of continuing, or ending an impeachment, are laid upon the ſhelf; in other words, if the deciſion is to be governed by analogies to *other* courts of criminal juſtice, and the leading principles of it, in our law, the record being ſtill in the houſe of peers, that court would, or might act upon it, from the point of the record itſelf; calling upon the culprit again to anſwer.—*The continuation of the evidence* would not be endured.

But if *precedents* in parliament itſelf are to regulate, and controul this analogy, a diſſolution

of parliament, in that view, leaves no record, upon which the court can act *at all*, or for *any purpose* in the new parliament.

I have the honor to be,

SIR,

Yours, &c.

LETTER THE ELEVENTH.

Aliud eſt *maledicere*, aliud *accuſare*. Accuſatio crimen deſiderat, rem ut definiat, hominem ut notet, argumento probet, teſte confirmet. Maledictio nihil habet propoſiti, præter contumeliam; quæ, ſi petulantiùs jactatur, *convicium*, ſi facetiùs, *urbanitas* dicitur.

CICERO.

SIR,

I HASTEN to releaſe you (or, I ſhould rather ſay the reader, who may have thought me worth his attention) from the political, hiſtorical, and legal evidence, which an intereſting purſuit, at leaſt in *my* view of it, has tempted me to lay before you. Perhaps, in what I have written, may appear that very zeal of a partiſan, which I have deprecated, not only as an inſult upon the public, but as being of ſerious prejudice to my own argument: Yet, I can with truth affirm, that I have not been conſcious of this polemical ſpirit, for a ſingle moment. If the indiſcretion of a nature, which does not pique itſelf upon the oppoſite virtue, or of a pen, which never had the courage before, to encounter general criticiſm upon a field of ſuch

extent, has betrayed me into words that are too ſtrong, I recall them, and wiſh the reader may in candour put them to the account of that "*incuria*," which even *you*, Sir, (though in *you*, genius always accompanies it) cannot univerſally eſcape.

It becomes me, who am one of the leaſt of a minority ridiculous in point of numbers, but in many parts of it made reſpectable by the weight of* legal abilities, and perſonal character, to be diffident in my own thoughts, or in thoſe which I may have borrowed from others who formed a part of that minority, againſt the political, and favourite opinion of the day,—at leaſt in parliament.

I am comforted however by this reflection—that every liberal ſupporter of the "*victrix cauſa*," has admitted, in expreſs words, the *importance* of the diſcuſſion; and has proved, that in his own mind a *doubt* hangs over it, by thoſe vehement efforts which his eloquence, or wit, or talent of reaſoning, or weight of party-con-

* I remember a minority of *five* in the houſe of lords: two of them were *Lord Northington*, and *Lord Camden*. By accident *Lord Mansfield* was not in the houſe, or would have made *ſix*, having given his opinion againſt the vote that prevailed.

nections,

nections, or popularity of character, has called forth into the debate.

Nor is it in one view unaccompanied with ſome flattery to the lawyers in this minority, that perſonal ridicule upon one of them, and a general banter upon their whole profeſſion, as a part of the ſenate, has been thought a rhetorical, or political expedient, of no deſpicable value, by ſuch powerful reaſoners as *Mr. Burke* and *Mr. Fox.*

But, firſt, I am to deprecate, as a conſtitutional member of parliament, all diſtinction of rich and poor, of high or ſubordinate rank, of commerce or of land, of noble or plebeian origin, of military or naval profeſſion, of politicians or lawyers, of this or that ground for independence, for ambition, for perſonal views, or party engagements;—in thoſe, who, ſuch as they are, conſtitute the repreſentatives of the people: They are all of them treated by the conſtitution (without *Marc-Antony*'s ridicule,) as " *honourable men.*" Theſe, are principles which I have learnt ever ſince I begun to reflect upon the nature of a parliament, in the popular ſcale of it; and they are principles, which I have learnt in part from your captivating eloquence.

Let

Let me aſk in the next place, what is the offence of theſe lawyers, which has drawn from you ſuch a contemptuous *anathema* againſt their whole profeſſion (except thoſe who voted, and ſpoke upon *your* ſide); as if in future, the houſe of commons could place no confidence in them? It is, that upon a ſubject affecting deeply the eſſential rights of the conſtitution, and thoſe of perſonal freedom in particular, they could not ſurrender their faith to the miniſter of the day, to his, or your eloquence, to the weight of your party, and the miniſterial one united; or to a third ſet of their opponents, the culprit's admirers, and friends; but have delivered their ſentiments like men of honour, without violence, but without fear.

Shall it be *forgot*, that moſt of them ſee in the miniſter whom they oppoſed in this debate, an object of their general approbation, and political attachment? or, that on the other hand, a very popular advocate, whoſe want of political zeal for *your* ſide of the houſe has never been queſtioned, came forward, and threw the gauntlet, with his accuſtomed ſpirit, in ſupport of principles which he thought inalienable bleſſings of the conſtitution?—Let it then be recorded, as at leaſt *one* merit of theſe

diſſentient

diſſentient lawyers, that party of no kind has at all ſwayed their conduct. As to their perſonal character for integrity, (of all virtues in a ſenator the beſt,) even the "*urbanitas*" deſcribed in the motto, which diſtinguiſhed *your* elegant, though keen ſatire upon them, from the "*convicium*" that followed it, will hang like the ſhaft in *Virgil*,

"*ſummo clypei nec quicquam umbone.*"

But, "*they look to the houſe of lords.*" Where, ſir, muſt that *Revolution* have been found, which you ſo correctly underſtand, and with ſuch dignity have reſcued from inſidious friends; if, before the golden period arrived, *Somers* (a name which no other, of any age, or of any ſcene, has yet ſurpaſſed, in liberality of ſentiments, in the delicacy of political diſcernment, or in the moſt elevated ſpirit of public virtue) had been called, with popular effect, by ſuch eloquence, and wit, as yours, "a bird of paſſage," "not at home in "the houſe of commons," but, "perching there "in his way to the lords," with "his eye fixed "upon thoſe flowers and fruits that were glow-"ing, and ripening for him there,—in that "reſting-place of delight?" If in thoſe days his profeſſion, which had always conſiderable weight in the houſe of commons, had been depreciated, where ſhould we have traced the "*juſt*" and the

" *tenacious* of *his purpoſe*," in *Holt*'s character? or the experience, and calm wiſdom of *Maynard?* If in earlier times the ſame ridicule had been faſhionable, we ſhould have loſt the patriot firmneſs of *Selden*, accompanied with a maſs of learning that in points of the deepeſt conſequence to the liberty of the ſubject, weighed his adverſaries down; the liberal, expanded, and luminous mind of *Lord Hale*; I may add, with all his blemiſhes, the *Earl of Clarendon?* Were theſe, men of cramped ideas, or of that groſs incapacity for conſtitutional knowledge, and political ſpirit, which you aſcribe to the inherent character, and radical infirmities of our profeſſion? May I not aſk too, if you have diſcovered in the hiſtorian's page, that lawyers have been even *accuſed* of the " *eſprit du corps*, in " parliament;" or of any views to power and rank, that were not rather challenged, than ſolicited by the weight of their character?

I ſhall take up one more topic, which illuſtrates, by a recent example, the public ſpirit, and the political independence of *lawyers, in the houſe of commons.*

Some of thoſe who form a part of the minority upon your victorious 23d of December 1790, gave proofs of an attachment which no intereſted motive could ſhake, either to their *ſovereign*, (whom

(whom *you*, Sir—but I check myſelf—) or to that *miniſter*, whom a certain awful event was threatening to reduce into the common ranks of life. The chances were then a million, perhaps, to the minuteſt value in the oppoſite ſcale, that a *novus rerum ordo*, a new *reign*, in effect, would ſet a mark upon *their* opinions, to the ruin of their political hopes.

On the other hand, very *ſagacious politicians*, who were *not lawyers*, embraced a different line of conduct, and *begun* to diſcover merits upon *your ſide* of the houſe when it was going to be the *other ſide of it*, which till that critical, that illuminating hour, had eluded their diſcernment.

Poſterity will determine (if it ſhould be intereſted by ſuch enquiries at all) whether here *the politician who was no lawyer*, or *the lawyer who was no politician*, acted with moſt honor to the public, and beſt underſtood the conſtitution. But he, whoſe new opinion led him to emolument, and who became a "*whig*," juſt at the time, of all others, in which men of that *name* (for it is no more, "*vox, et præterea nihil*") were to fill offices of profit, muſt own to me, that by accident, *his* public virtue appeared in a more "*queſtionable ſhape*," than a certain obſtinacy of

 opinion,

opinion, which paid its court rather to a ſelf-approving conſcience, than to power and "*the* "*riſing ſun.*"

Having, however, obſerved, that before the impeachment of *Mr. Haſtings*, you had not formed this contemptuous opinion of the lawyers upon other topics equally important, in which they took a part, I muſt really hope, for their ſake, that your late ridicule of them aroſe from a diſlike which you ſeem to have ingenuouſly conceived againſt thoſe land-marks of criminal juſtice, which *their* habits and reflections have taught them to revere;—from a wiſh to reach this *Indian* culprit with more facility than mere law can admit, with a more elevated hand, and upon more unfettered principles of reaſon. I have obſerved, that even the rules, or *principles* (for ſo *we* call them) of legal evidence are not admitted into *your* creed, as any check upon thoſe who accuſe by impeachment. In vain you have been told, that ſuch rules as theſe had nothing technical in them, but were inferences of ſound reaſon,—of the moſt liberal juſtice,—of that mercy which the law of England loves, and of general convenience in guarding the "*cuſtodes ipſos*," when crimes are before them. But we muſt unlearn in *your* academy theſe *quaint* precepts, and admit

in

in a court of parliament, that even rules of teſtimony, like every thing elſe, if *the legal organs of the people* accuſe, are to ſhift as well as they can, according to the exigency of the day, or of the minute; and ſo model themſelves as to attain the *political* object, or vindicate the national honor, in convicting, and puniſhing a delinquent of ſtate.

Monteſquieu, I remember, in his very ingenious chapter upon our conſtitution, has given to the judges upon impeachment a power which the conſtitution has *not* given to them; but it is a power of mercy, in tempering the rigor of the law which has been violated. The idea of enabling the accuſer to diſpenſe with rules of law, *againſt* the culprit, in order to facilitate his conviction, had not been imparted by his Engliſh friends to the docility of that enlightened *hiſtorian*, nor had the wiſdom of it ſtruck *him* as a *philoſophical reaſoner* upon the policy of government.

As to *Mr. Haſtings*, whom you have repreſented the *lawyers* to befriend, I take pride in declaring, again and again, my uniform opinion, that you have moſt ably ſelected him as the object of your impeachment; and that no adequate juſtice could ever have *tried* him for the offence which you have charged againſt him, (upon ſufficient *ex-parte* evidence,) if this ultimate reſource, and

and ſolemn expedient of the national honor had been overlooked, or entruſted into any hand but your own.

The power of impeachment, if dignified and chaſte in the uſe of it, gives to our view the moſt elevated ſcene that human juſtice can admit:—*not* becauſe it has rules of its own, at a moment's warning, for any of its purpoſes, adverſe to the culprit;—*not* becauſe it may reflect upon every judgment of the court, which is of uſe to *him*, and may inſtitute even a perſonal conflict with judges who form a part of that court*;—

not

* *Lord Bacon* ſays;—"Let not the *counſel* at the bar chop "with the judge, nor wind himſelf into the handling of the "cauſe anew, after he hath declared the ſentence."

It is a diſtinction of the managers for an impeachment, that no counſel at the bar appear for *them*. The commons execute no part of their accuſing function by attornies; they demand impriſonment, or bail, or trial, or judgment, *in their own perſons*; they are, in the eye of the conſtitution at leaſt, *their own counſel*; and this, which has been lamented as a diſadvantage, is only *too* beneficial to them, unleſs temperately managed, with a diſcipline of ſelf-government, which has been recommended even to an epic poet's diſcretion;—

—"*parcentis viribus, atque*
"*Extenuantis eas, conſulto!*"—

It may be, in the firſt place, an apology at once for a deportment which no *counſel* would attempt; becauſe *he* would know, that it would give immediate offence to the court; and for propoſitions, which no *lawyer* who valued his character, would riſque in a court of juſtice.

In

not becauſe it may endeavor to intimidate the advocates for the accuſed by the political rank of the accuſers;—*not* becauſe it may harraſs the party with ſuperfluous delay, and expence;—*not* becauſe it may ramble into accuſations, which are not alledged, and cannot, therefore, be authenticated: But upon very different ideas of an *elevated* character.—*Becauſe* it reſcues a national concern from courts that would be unequal to it, and ſcorns to aſk a jury of *London*

In the next place, it enables them to impreſs, by the aſcendant of their eloquence, topics of odium againſt the culprit, which admit of no proof. They can reaſon thus (and it is an argument from their *weakneſs*, to their *ſtrength*):—"We are *no lawyers*;—if you bind us by the rule "of *inferior* courts, a rule that we cannot underſtand, you "tell us at once, that we are no longer to accuſe: Let us "proceed, my lords, by rules of our own, rules that we *do* "underſtand; ſuch as the rule of policy—of ſtate conve-"nience—natural juſtice, interpreted by ourſelves, and "without a ſingle fetter upon it—principles of ſentiment, "and feelings of public ſpirit." In other words (but in their ſleeve) they can tell them—"Let us tempt you to "convict this man, by eloquence, rank, and power!"——

"*Jane pater*," *clarè*,—*clarè cum dixit*, "*Apollo*,"
Labra movet, metuens audiri,—"*da mihi, pulchrè*
"*Fallere*."

In the laſt place, it elevates the advocate for the accuſer, who is indeed the accuſer himſelf, into a figure of political importance, with whoſe pride of ſtation, the only attainable advocate for the culprit is not upon even ground.

or

or *Middleſex*, if treaties have been violated, nations exterminated, or princes oppreſſed, and enſlaved*;—*becauſe* the accuſer by impeachment is the people, in the moſt awful ſhape of their power; and if tribunals were to judge, who were alſo taken from that claſs, they would be (as *Monteſquieu*, writing upon the very point, well expreſſes it, by a term that admits of no tranſlation) *entrainés* by the weight of ſo powerful an accuſer;—*becauſe* (to follow that writer) "it is "neceſſary, in order to ſuſtain at once the dignity "of the people, and the ſecurity of the individual, "to make the popular branch of the legiſlature "accuſe before the other branch of it, conſiſting of the peers, who have neither the *paſſions* "nor the *intereſt* of the accuſer;"—becauſe it holds a leſſon to miniſters, great men of all deſcriptions, and even the ſovereign himſelf, that a feeling and a national ſpirit, by its "*expreſs image*," the houſe of commons, can reach any delinquent of ſtate, and guard the dignified character of Great-Britain againſt the diſhonour of public wrongs;—*becauſe* it marks to the pub-

* A more exquiſite piece of ſatire was never heard than your's upon *Stratton*'s fine, in the king's-bench:—"*The "legal price of a rebellion is* 1000 *l.*" But there was deep ſenſe in this wit; for the courts of law have not arms long enough to reach the extent of ſuch crimes, or political energy enough to puniſh them as they *ſhould* be puniſhed.

lic, that although national feelings and political objects elevate this proceeding in *dignity* and *uſe* above a common indictment, the accuſer glories in ſubmitting to that, which is paramount even of *his* character*, to a law that protects the "*giant*" as well as "*the* "*poor ſharded beetle*," the oppreſſor, and the oppreſſed, againſt the worſt of all tyrannies, *judicial* deſpotiſm—to a law of *rules*, and *principles*, the accumulated wiſdom of ages, and calculated for no ſhifting exigencies of the day, but for univerſal judgment:—*becauſe* he who accuſes by impeachment is, in a better view of that phraſe, *the people*,—feels as *they* feel, and reſpects, without ſhame, as *they* alſo reſpect, thoſe preſumptions for the accuſed, which every man's heart approves; thoſe ramparts of legal evidence, and of equal juſtice, which every man is born to ſupport:—*becauſe* the impeaching ſenator does not find his underſtanding too proud, or his enthuſiaſm too vehement, for thoſe rules of *competency*, and *credit*, which *govern* the higheſt courts of law in *their* ſyſtems of *proof*; and are neither technical, nor obſcure, but as liberal as they are clear, and as

* The anſwer of the judges to *Henry the VIIIth* deſerves to be writ in letters of gold:—"An *inferior* court could not, "in *law*, or in *juſtice*, do it; and we are of opinion, that "the *higher* the court is, the *more juſt* they ought to be."

deep in their policy as they are ſmooth upon the ſurface.

But if to the uncommon advantages of this accuſer, can be added the indefinite continuance of his impeachment; — if the death of the accuſer in his popular office (which alone enabled *him* to accuſe) is to have no effect in terminating the riſque of the culprit, but may expoſe him to a *new* accuſer, more bitter, perhaps, and leſs informed, or liberal, than the firſt; —if the king's power of diſſolution may baffle the riper judgment of the commons when it inclines them to abandon their ſuit,—if it may enable him, after accuſing by influence through a corrupt houſe of commons, to harraſs by delay, to oppreſs by impriſonment, and convict by intrigue, a popular culprit, impeachments will become unpopular, and great offenders will triumph in their impunity. It is remarkable, that with all the advantages of this proceeding in theory, few impeachments, ever ſince the line of *Tudor* failed, have been either juſt in themſelves, or well conducted. *Lord Bacon*, and *Lord Middleſex* were proper objects of impeachment, and fitly puniſhed; but the mode of proceeding againſt them was abrupt, and irregular. The impeachment of the rebel Scotch peers was moſt awfully, and ably conducted in both of the two laſt

laſt reigns. The impeachment of *Lord Macclesfield*, though it ſprung from political motives, and was perhaps too ſevere, was uſeful in the example, and very dignified in its conduct. The impeachment of *Sacheverell* was entirely political, violent, and injudicious; though it brought forward ſome of the ableſt arguments againſt "*paſſive obedience*," that were ever thrown away upon ſuch deſpicable adverſaries. One of thoſe arguments, and which is of unexampled ability in the annals of Engliſh, and perhaps of Roman eloquence, brilliant as they are, is the work of a *lawyer*;—of that ill-fated, but accompliſhed peer whom I have laſt mentioned, and who owed the ſeals to the exertion which he then made.

The reverſe of the picture it gives me pain to contemplate. The impeachment of *Lord Danby* was in itſelf perfectly juſt, and, if guarded in its deſcription, pure in its motives, or even decent in its conduct, would have done the houſe of commons or the peers no diſhonour;—but, as it is, no meaſure ever diſgraced either of thoſe two aſſemblies more. Nothing but oblivion, or contempt, ſaves the earlier impeachment of *Lord Clarendon*, from that brand of odium upon it, which elſe would be it's fate. The impeach-

ment of *Lord Stafford* was* madneſs in cold blood: And the memory of *Lord Nottingham*, great as he was in his own court, will be for ever polluted by his addreſs to that peer, when he appriſed him of his fate. *Burnet* calls it the moſt eloquent ſpeech that he, the chancellor, ever made; but cenſures the very ſolemn and *judicial* declaration, that, "a deſign to murder "the king, &c. had been on foot."—Of the *eloquence*, I ſee no proof;—but of the *humanity*, and *good ſenſe*, let the reader judge by the fol-

* Impeachment has been compared moſt abſurdly to the ſuit of a party in what is called the *appeal*, and which demands puniſhment for the *injury* ſuffered, more than for the *offence* to the public. It was firſt pecuniary, and was changed into capital, but ſtill partakes the idea of civil, and pecuniary atonement; inaſmuch as the death of a convicted *appellee*, may be expiated by a fine,—that is, the *appellant* may releaſe the *appeal* for a ſum paid as the condition of that releaſe.—But the ancient uſage was, that all the relations of the party murdered, had the *comfort* or "*privilege*" of dragging the *appellee* to his place of execution. This kind of *ſavage recompence*, is, after all, in a more enlightened age, encouraged as a part of our law; for the *appeal* at this day is, in its legal principle, nothing elſe; and it ſeemed as if the managers againſt the *Viſcount Stafford* felt that principle of the analogy; with only one ſhade of difference, that in ſhedding *his* blood they reſented the injury of *others*, or puniſhed his religion by the *murder* of a harmleſs, and weak individual, becauſe they *could* not puniſh it in the *Duke of York*, by *excluding* him from the Engliſh throne.—Theſe, I call, again, the *tyrannies of public virtue*.

lowing extracts; which, if they were not follies that ended in ſhedding innocent blood, would ſtimulate one's ridicule more than one's horror.

" Who would have thought that a perſon of " your quality, &c. ſhould have entered into ſo " infernal a conſpiracy as to contrive the murder " of the king, the ruin of the ſtate, the ſubver- " ſion of religion, and, as much as in you lay, " the deſtruction of ALL the BODIES and SOULS " in THREE CHRISTIAN NATIONS?

. . . . " That there hath been a general, and a " deſperate conſpiracy of the papiſts, and that *the* " *death of the king* hath been *all along* one *chief* " *part* of the conſpirators' deſign, is now *appa-* " *rent beyond all probability* of *doubt*."

Mark his proofs! " What was the meaning " of all thoſe treatiſes which were publiſhed " about two years ſince againſt the oath of " allegiance, at a time when no man ever dreamt " of ſuch a controverſy?—What was the mean- " ing of *Father Conyers*'s ſermon upon the ſame " ſubject; but only, there was a demonſtration " of zeal, as they called it, intended againſt the " perſon of the king, which the ſcruples ariſing " from that oath did ſomewhat hinder?

" To

" To what purpoſe were all the correſponden-
" cies with foreign nations?—The collection of
" money among the fathers, abroad, and home?
" What was the meaning of their governing
" themſelves here by ſuch advices as came fre-
" quently from *Paris* or *St. Omer's?* And how
" ſhall we expound that letter which came from
" *Ireland*, to aſſure the fathers here, that all
" things were in readineſs there too, as ſoon as
" the blow ſhould be given?

" *Does any man now begin to doubt* how
" *London came to be burnt*; or by what ways,
" and means *poor Juſtice Godfrey fell?* And
" is it not apparent by *theſe inſtances*, that ſuch
" is the frantic zeal of ſome bigoted papiſts,
" that they reſolve no means to advance the
" catholic cauſe ſhall be left unattempted,
" though it be *by fire and ſword?*"

The impeachment of *Lord Somers*, &c. in 1701, and that of *Lord Oxford*, &c. in 1717, came to nothing;—they were political meaſures of party-intrigue.

A ſingle word upon the *conduct of the impeach-ment* againſt *Mr. Haſtings*.—I admire moſt unequivocally, the eloquence employed in it, for the nobleſt of all purpoſes. I think too, that

as

as long as our *commiſſion*, if I may uſe that phraſe, is unrecalled, we cannot blame the managers, with delicacy, or prudence. I diſapproved the check which you received in the houſe of commons, upon the ſubject of *Nuncomar*, and I did not vote for it. I *lament*, without blaming, *the time which has been occupied in this impeachment*, for one plain reaſon—*Mr. Haſtings* is either innocent or guilty: If the former, his acquittal is bare *ſecurity*; it is not *honour*, as it *ſhould* be; for it will be aſcribed by the common obſerver, to the mere impulſe of compaſſion upon his judges for the anticipated puniſhment which he has already undergone: If he is guilty, conviction, and puniſhment will be leſs exemplary; becauſe, they will be counteracted, and weakened by the ſame compaſſion operating upon the good-nature of the public. I am, however, much pleaſed with your laſt propoſal, to ſhorten the remainder of your articles:—It was humane to the culprit, juſt in its principle, correct in its form, and very judicious in the reſpect it marked for the public opinion.

I have the honour to be,

SIR,

Yours, &c.

LETTER THE TWELFTH.

Nunc, quamobrem has partes didicerim, paucis dabo.
TERENCE.

SIR,

THERE is not one of the many aſtoniſhing talents, that nature, in her moſt partial mood, has given to *Mr. Fox*, which I have ſo often wiſhed in vain to borrow of him, as the talent of abbreviating, with new force, the ſubſtance of an argument previouſly delivered by himſelf; but with ſo little hint of a regular method, and with ſuch variety of detail, that you would little ſuſpect the arrangement, by which the parts of it are divided, or united, as links of a chain.

In general, attempts at an epitome, either, according to *Horace*'s comment upon them, "*ſtrain at brevity, and become obſcure*;" or they are tireſome repetitions of the *ſenſe*, in paſſages of detail, if not of the *words*; or, without being

being ſhort, omit the paſſages which moſt require to be impreſſed.

I ſhall hope to avoid thoſe *defects*; though I deſpair to catch the fainteſt my of that envied *power* which in *Mr. Fox* appears to me unexampled, and above all competition.

My firſt attempt has been, to refute *general principles* which I thought new to the conſtitution, dangerous to its freedom, and ready apologies, in worſe times, for the law of tyrants in the houſe of liberty;—for a *diſcretion*, which is an abuſe of the term, becauſe it is blind and unlimited;—for diſcord between the *accuſer* and the *judge*;—for endleſs confuſion between *rules* and *principles*, between *expediency* and *right*, between *legal* and *conſtitutional*;—for converting public accuſers, and an open trial, into a ſcene of inſult, and of torture, which the pureſt virtue could not eſcape.

Combating theſe principles, with an impartial zeal for truth, but with a diffident ſpirit, I have ſeparated the *reaſons* from the *eloquence* that clothed them in a robe of magic, which not only adorned, but conſecrated them. Ingenuouſly wiſhing to deprive the *argument* of no weight that was due to it, I have caught, perhaps, the mere

points of it, their *ſubſtance*, *arrangement*, and *connection*, though in a very few lines.

Proteſting againſt the competency of an inference to what is *juſt*, from what is *expedient*, (though we are told that *convenience* is *juſti prope* mater,) I have yet anſwered this popular challenge, putting ſeveral caſes, (none of them I hope, extravagant,) in which *the continuance of trial by impeachment, after a diſſolution of parliament*, would ſtrike with infinite prejudice at the liberty of the ſubject, and with a death's-blow at the accuſer's diſcretion, which is an eſſential part of his right, and of his truſt;—would enable the king to guard his miniſter with leſs indecorum, and would give him a more ample field of power, in the perſecution of a meritorious culprit.

I have then grappled, as well as I could, with all the other topics, in ſupport of this vote, ariſing from the nature of parliament, and from the nature of impeachments. I have met, and reſiſted, the *new* doctrine of a parliament *aſleep*, and *wakened* by the king;—the *inherent* right of a peer (equally *new*) to demand, *without ceremony*, his judicial character, as being inſeparable from his *robe*, in the houſe of peers;—the *legal organ* of the *people*, in their function (or "*privilege*")

" *lege*") of accuſer, which is alive, it ſeems, and has a pulſe (like ſwallows in the winter) between one parliament and the next, be the interval ever ſo long; the compariſon of this *legal organ* to an *attorney-general*;—and the right of impeachment, conſidered as *privilege*. Here too I have ſuſtained, as I hope (not againſt *ridicule*, but againſt any juſt imputation), a doctrine, which I avow to be a rooted part of my political faith and creed; " that by the conſtitu-
" tion of this government, the commons of Eng-
" land, in parliament aſſembled, have an inde-
" pendent mind, inſtead of being *agents*, in any
" ſenſe of the term, either to their local elector,
" to the conſtituent at large, to the people out
" of doors, or to another houſe of commons;
" that it is the duty of their ſeat, and repreſent-
" ative character, to act for the general and real
" intereſt of that popular claim upon the go-
" vernment, which they perſonate; but with a
" ſenſe of honor purely *their own*; with a diſ-
" cretion of *their own*; with a political ſenti-
" ment of men, or meaſures, equally *unfettered*;
" and with ſuch ideas of conſtitutional freedom,
" as *their own* reſearches, habits, or feelings,
" may have prompted them, *bonâ fide*, to en-
" tertain, in direct oppoſition (if their con-
" ſcience makes it neceſſary) to the wiſhes, and

" poſitive injunction of the electors, or to the " *teſtamentary* admonition of *departed* repre- " ſentatives."

And I hold this doctrine to be that of as true a *whig*, as any in the houſe of *Cavendiſh*, *Ruſſell*, or *Bentick*. I have called upon *Mr. Burke* for *his* countenance to this faith, by the manlieſt independence of conduct that his public life has ever marked; when, addreſſing his electors, he communicated, in better language, the ſame ideas which, in mine, expoſed me to ingenious, but ill-founded ridicule, and, moſt unfortunately for me, in the moſt eloquent ſpeech that has been heard.

I have combated the miſapprehenſion (as I took the liberty of ſuppoſing it) which gave to the *commons of England*, or of the *realm*, a controul over the *commons in parliament*, as public accuſers, becauſe every impeachment is in the *name* of them *both*;—an illuſtration, as I conceived, of my own principle; inaſmuch as all the authority which is imparted by the *name* of thoſe *prouder* commons, who are emphatically deſcribed, " *of the realm*," is given to their *ſubalterns*, the *commons of Great Britain in parliament aſſembled*, with an abſolute power to make uſe of that *name*, as *their own*. You, Sir, uſing the

the "*ardentia verba*" that impreſs your ſentiments with ſuch force upon us, have told us, that we, the commons, have in ourſelves, by ſomething livelier than *repreſentation*,—by "*expreſs* "*image*," the "*feelings* of the *nation*."—That we have, by the conſtitution, a *general* credit for thoſe feelings, I admit; but that a ſympathy of thoſe feelings animates *all* our meaſures, or opinions, and principles of government, is not even our *theoretical* boaſt:—It happens, for example, that your proſecution of *Mr. Haſtings*, in which the ſenſitive delicacy of honor, that ſhould be *national*, as well as *perſonal*, was deeply at ſtake, found the public at large completely indifferent; I was generally anſwered, "*we* "*don't care about him*:"—The *diſtance of the ſcene* was, in part, the occaſion of that indifference; but another, and more powerful cauſe of it was, that pretence for idleneſs which moſt of us too readily embrace; this, called itſelf "*the difficulty of the ſubject*;" which, to thoſe who were not initiated, was "*chaos and old* "*night*:"—What effect your brilliant perſpicuity in developing Indian politics, complicated as they were, may have produced upon the *national feelings*, better inſtructed, it becomes not me to ſay.

I have marked this *independence of character* in the commons, with peculiar anxiety, where it

it authorized, and *obliged* them to diſclaim the influence of their predeceſſors, to refuſe their moſt conſummate acts, either paſſed *without* the aſſent of the other eſtates, or *with* it, if to any conceivable extent ſhort of the legiſlative power.

I have traced the ſame character as extending itſelf to orders of any kind;—even to orders for the ſupport of their *privilege*, a point, in which their conſtituents, and the *next* houſe of commons have an equal intereſt:—orders, deliberately formed, and exerted with ſpirit, but either left incomplete, though in the minuteſt part of them, or incompletely executed. I have reminded the public, of that jealous conſtitution, that will not *ſuffer* the next houſe of commons, to diſgrace their calling, by a confidence in theſe meaſures, taken up at the point of their interruption;—or if they were *in pœnam*, ſuffer the object of them to be touched*.

* The idea of a ſeptennial change in the repreſentatives, does not originate in the ſuppoſition of a national judgment, that will influence the *old* and the *new* alike; but in the direct reverſe—in the policy of changing the men, by way of guard againſt their abuſe of power. Minorities and majorities are often tranſpoſed by this general appeal to the elector, and the legatary intereſt of an impeachment againſt *Mr. Pitt*, if there had been ſuch a meaſure, it would have been perfect ridicule to name, with a reference to this *organ of the people*, &c. at the opening of the laſt parliament.

I have

I have diſtinguiſhed the *commons* in *parliament* from an *agent* of any kind, from an *attorney general* in particular, who may be diſplaced by a ſudden breath of caprice, or of party, at leaſt; and who is bound by the acts of his predeceſſor, becauſe they are both of them treated as mere *agents* of the *king*, who has bound *himſelf* by the *words*, or the *acts* of his *agent*, for the time.

I have ſtated what appears to my underſtanding, the ſoundeſt argument that can be offered upon the *general principle*, as reſulting from the *courſe* of *parliament*;—a variety of inſtances, amounting, in their number, and value, to a *general principle*;—"that no chain of pro-"ceeding can be taken up, and continued, by "either houſe of the legiſlature, in a parliament "that is new, though in points of the moſt criti-"cal importance to the welfare, and ſafety of "the kingdom."

I have traced the *admitted* rule as to *bills* which had paſſed *both* houſes of parliament; and I have traced it, not as an *exception*, or as a technical rule, *ſtricti juris*, and with an obſcure origin; but as a marked illuſtration of the *general principle*, which is raiſed upon many *other* inſtances of a ſimilar nature; indeed, upon *all*, this

this of impeachment alone excepted—if it *is* an exception.

I have argued as forcibly as I could, becauſe it was in ſupport of an honeſt opinion, from a *bill of attainder*, where the culprit of ſtate is, in a peculiar degree, an object of natural puniſhment, where the commons unite a judicial to a legiſlative character, where the recourſe to *bill*, proves it the *only* way to reach the culprit, for offences which may touch the vital ſecurity of the government. I aſked, and I aſk again, if *Mr. Haſtings* had been a favourite miniſter of another ſovereign, of *Charles the ſecond*, for example; and if the *legiſlative trial* had laſted, as it might have done, for *three years*, what an eaſy taſk would the *admitted* conſtitution have put into the hand of that ſovereign, juſt after the lords had paſſed the bill, to end the parliament, and cloſe that proceeding for ever?

Having thus cleared my way, *firſt*, of the *general principles*, either as introductory guides to the debate, or, as bearing directly upon the conſtitutional ſenſe of a depending impeachment,—I have *next* followed you into the *uſage* of parliament, which is an admitted, and eſſential part of its *law*.

I have

I have adjuſted here, the *onus probandi*; inſiſting, that as the continuance of impeachment *after evidence heard* by a former court of the peers, has *never* happened *in fact*; and as *any* continuance of it muſt be a perfect *anomaly*, with a reference to the *general principle*, it was for *them* who affirmed that continuance, to fill up this blank, by evidence of, at leaſt, indirect, and collateral uſage, whoſe analogy would reach the caſe before us.

I have touched upon the political argument of diſabling a miniſter to elude an impeachment; and have reverſed the hypotheſis, by that of a king adverſe to a popular culprit, a diſcarded miniſter for example, and at the head of a powerful oppoſition, in a corrupt houſe of commons;—the accuſer tired, or frightened, by the popular clamour—the evidence cloſed on both ſides—the diſſolution of parliament by an obvious fineſſe enſuring his puniſhment at a future, and more *commodious* period, "*with all* "*appliances, and means to boot.*"

I have proteſted againſt the unequal, and partial juſtice, which is, in other words, no juſtice at all, of imputing to the commons an exemption from the human accidents of deſpotiſm, intrigue, and corruption;—but, giving the mo-

nopoly of thoſe infirmities either to the ſovereign, or his miniſter. Here, as in many other parts of the work, I have taken pride in the idea of a tempered authority, in which a mutual, and jealous vigilance againſt the abuſe, or aſſumption of right, guards *all* the power of government, and is the beſt of all ſecurities for the governed*.

I have barely touched upon the analogies of law, in other, and, as they are called, *inferior* courts; becauſe I knew, how ſhy the *layman* is (unleſs when he has *political* occaſion for them) of theſe analogies, and becauſe I really did not feel that I wanted them, unleſs where the moſt obvious good-ſenſe annexed, and united them to the law of parliament, ſo as to make them in principle one and the ſame.

I have marked the neceſſity of conſulting *precedents*, and of conſulting them *deeply*; refuſing the paradox which called itſelf by the name of "*privilege*;" and confined the inſpection of *journals* to the houſe of commons, in which no *judicial precedent* could be found.

* "Pour qu'on ne puiſſe abuſer du pouvoir il faut que "dans la diſpoſition des choſes *le pouvoir arrête le pouvoir*."
MONTESQUIEU.

I have

I have compared the two precedents of 1678 and 1685, ſummarily at firſt, but extended the enquiry as to both, into the character of the age in which thoſe orders reſpectively iſſued.—I have examined hiſtorically, the actual view, and uſe of the order 1678, followed, and preceded by various acts of cruel injuſtice, levelled at the *Earl of Danby* in parliament. In ſhort, I have proved, as I think at leaſt, the whole ſyſtem of thoſe tranſactions political, and corrupt, or at the beſt, as having paſſed in times that could almoſt be deſcribed, "*flagrante bello.*"

I have met the *new* argument, *new* I mean, as facing the light, which has built *the order of* 1678 upon a ſuppoſed analogy to that of 1673. The reader will judge for himſelf, upon this refined analogy, after the diſſection of it which I have taken the liberty of preſenting to his view.

I have diſcriminated the effect of impeachment upon the diſcretion of bail in "*the courts* "*below*," (as we, members of parliament, call them,) an effect, which has been argued as proving—"the continuance of impeachment, "even in the eye of *law*, when parliament is no "more."—I have explained in what reſpect this right of bailing is *neutral*, and in what other

views it rather *injures* than *aids* the ſuppoſition of a " *depending impeachment.*"

I have ſtated the caſe of *Blair*, and the catholic peers in 1690, with all the candour, and particularity, that could beſt enable the reader to form his own concluſion.

I have admitted the force of the argument, *as far as it goes*, reſulting from the *order of* 1701, with a view to the *Duke of Leeds*; but I have limited the extent of it, by the natural effect of the *judicial acts* preceding it;—and I have, at leaſt, as I hope, replaced the authority of thoſe *judicial acts*, by *Lord Oxford's caſe*, upon the footing of its reference, and analogies.

I have made a ſhort, but, I hope, ſuperfluous apology, for that liberal, and uſeful profeſſion, which I conſider, (though few have gratified ingenuous ambition leſs in it than myſelf) as the moſt honourable part of my exiſtence; and which, as a relation of *Lord Somers* told you, with as much truth as manlineſs—*gave to us the Revolution.*

I have next offered, and perhaps obtruded, an independent, as well as cordial teſtimony, to *your* public ſpirit—that of the miniſter—of the parliament—

parliament—and of the *age*—in this proſecution of *Mr. Haſtings*. I have commended impeachments in general, with a zeal which I *felt*; but I have taken the liberty of adding, what I conſider as the *demand* of an impeachment upon the accuſer and the judge, in their *mode of conducting it*, with a view to the *national honor*, and even to the *political wiſdom*, at ſtake in it.

Forgive, Sir, this attempt at a general review of my own argument, contained in theſe letters to you; an attempt which I have made for the purpoſe of convincing, in a few words, thoſe who are familiar to the debate, that I have taken up *moſt* of the topics, if not all of *them*, which had been preſſed into the argument there; and, at the ſame time, in order to delineate what appears to me a correct method of treating the ſubject, in point of arrangement.

Your character, Sir, is really ſo eminent in fame of more kinds than one, that it would be a degree of impertinence for *me* to commend it.

On the other hand, there is nothing more diſingenuous than violent, or unqualified praiſe: Though to expatiate on the faults of a celebrated perſon, is at once invidious, and mean. I hope it will be admitted, that I have treated your public name with reſpect;—the obligations of the public to many of your efforts, with gratitude;—and the purity of your intentions, in which I have always confided, with eſteem: but without prejudice to that ingenuous freedom, which enables even *me* to oppoſe many of your ſentiments, whether exemplified in your words, or in your conduct.

From the reader (if I *ſhould* be *read*) I am the moſt anxious to obtain this comment upon my work;—" that I have written as I thought, " and felt;—that I have ſtated the adverſe ar- " guments to my own, with candour;—that I " have not been flippant againſt any of thoſe " with whom I have differed;—or ill-tempered; " —or too confident in the reſult of my own en- " quiries." If he ſhould then tell me, " that " I have been fortunate enough to reſcue the " *minority* of December 23, 1790, from a cur- " rent opinion of their diſtreſs for the want of " liberal, or conſtitutional ſupport; and that I " have opened the ſubject *fairly* to a diſpaſ-

" ſionate

" ſionate review;"—I ſhall be overpaid for the time theſe enquiries have occupied, and for the painful ſolicitude of the mind engaged in them.

I have the honor to be,

SIR,

With infinite reſpect and eſteem,

Your moſt obedient ſervant,

GEORGE HARDINGE.

BEDFORD-SQUARE,
4th *April*, 1791.